# MISSISSIPPI LAW JOURNAL


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# ADVANTAGE PLAY AND COMMERCIAL CASINOS

*Anthony Cabot*[*]
*Robert Hannum*[**]

## INTRODUCTION

Advantage play is a broad term to describe a situation in which a player through some method of play can acquire an advantage over the casino in the context of a gambling contract.[1] In other words, advantage play is where the player can overcome the mathematical advantage that is built into every house-banked casino game. Advantage play is more than a hypothetical question. Some experts believe that advantage

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[1] DUSTIN D. MARKS, CHEATING AT BLACKJACK AND ADVANTAGE PLAY 101 (1994).

players take as much as three (3) percent of all moneys wagered in commercial casinos.[2]

Casino-style gambling[3] involves a contract, which is sim-

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[2] Rod Smith, *Advantage Gambling: Official Requests 'Guidance,'* LAS VEGAS REVIEW-JOURNAL, July 10, 2003, *available at* http://www.reviewjournal.com/lvrj_home/ 2003/Jul-10-Thu-2003/business/21692188.html.

[3] Gambling involves any activity in which a person places a bet or wager. Generally, a bet or wager occurs when a person risks something of value on the outcome of an uncertain event (1) in which the bettor does not exercise any control; or (2) which is determined predominately by chance. *See e.g.*, Midwestern Enters., Inc. v. Stenehjen, 625 N.W.2d 234, 237 (N.D. 2001) (internal citation omitted). Courts often oversimplify this definition by concluding that gambling is any activity that involves a prize, consideration and chance. *Compare* N.D. CENT. CODE 12.1-28-01(1) *with Stenehjen*, 625 N.W.2d at 237. Without all three elements, the activity is not gambling. Chance is a difficult element to define. By its dictionary definition, chance means "an apparent absence of cause." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 301 (2d ed. 1979). The difficulty, however, comes in determining when chance predominates a particular activity. To assess whether an activity meets this element, one needs to envision a continuum with pure skill on one end and pure chance on the other. The prevailing rule in the United States is that the element of chance is met if chance predominates, even if the activity requires some skill. *See, e.g.*, State v. Hahn, 553 N.W.2d 292, 293 (Wis. Ct. App. 1996). Some games, like a traditional slot machine, meet this requirement since they contain pure chance. Other games, like chess, that contain no chance are not gambling. Between these are many games that contain both chance and skill, such as blackjack (probably gambling) and backgammon (probably not gambling). Yet, once one enters this gray area, he or she is at risk because a ruling could be upheld regardless of the trial court's decision. In these cases, a court would have to decide whether skill or chance predominates a particular activity. In the only case involving backgammon, however, a New Jersey court held that it was illegal gambling. Boardwalk Regency Corp. v. Attorney Gen. of N.J., 457 A.2d 847, 852 (N.J. Super. Ct. Law Div. 1982). In that case, the court did not apply the majority predominance test, but based its decision on the fact that backgammon contained some chance. *Id.* To further complicate the analysis, courts in different states can apply the same test to the same activity with conflicting results. *Compare Boardwalk Regency Corp.*, 457 A.2d at 847, *with* Wetmore v. State, 55 Ala. 198 (1876). The Supreme Court of Alabama concluded that backgammon is a game that is "brought about much more by the skill of the contestants, than by the accidental fall of the dice." *Wetmore*, 55 Ala. at 200. An Alabama statute at the time prohibited the use of games with cards or dice at a tavern, inn, store, house for retailing liquor or any other public place (a statute similar to one now enacted as ALA. CODE § 34-6-12 (1999)). *Id.* at 199. The court explained that the *backgammon* game is not a game of dice, even though dice are used, as the dice do not determine the result of the game. *Id.* at 200. In *Boardwalk Regency Corp.* the court found that despite any skill involved in the game of backgammon, many factors in the game, including the doubling tech-

ply a promise, or set of promises, between the casino and the player.[4] The law provides punishment for the breach of such promises.[5] In the context of casino play, the casino promises to pay the patron a predetermined sum if certain conditions are met. In turn, the patron agrees to place the sum of the wager at risk if those certain conditions are not met. Take slot machine play as an example. After the patron deposits the correct number of coins or tokens and activates the device by pushing the play button or pulling the handle, the major condition to payment of a jackpot is that the reels must come to rest with a winning combination aligned on the payline.

Most gambling contracts, however, have two unusual aspects. The first unusual aspect is that the major condition to the contractual obligations of the casino and the player is determined in whole or part on the outcome of chance, typically a "random" event.[6] Again, using the slot machine example, what determines the placement of the symbols on the payline in modern electronical slot machines is a random number generator within the computer that runs the slot machine.[7] A random number generator is merely an algorithm, or a computer program with a well-defined set of instructions, finite in number, that produces numbers that appear to be random.[8] Each number generated may correspond to a group of symbols on a reel-type machine. Some of these groups are combinations that result in the patron winning and others result in the player losing.[9]

In other games, the random events that determine winning and losing combinations are decidedly less technical. For

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nique, which results in increasing points attributable to a certain game, were an "uncontrollable element of chance." *Boardwalk Regency Corp.*, 457 A.2d at 851.

[4] *See infra* notes 185-212 and accompanying text.

[5] *See infra* notes 348-49, 356 and accompanying text.

[6] *See supra* note 5, and accompanying text.

[7] ANTHONY CABOT, CASINO GAMING POLICY, ECONOMICS AND REGULATION 367-68 (1996).

[8] *Id.* at 368.

[9] Nigel Turner & Roger Horbay, *How do Slot Machines and Other Electronic Glambling Machines Actually Work?*, J. GAMBLING ISSUES, July 2004, at 8-11, *available at* http://www.camh.net/egambling/issue11/jgi_11_turner_horbay.html.

example in craps, the random event is the roll of two dice; in baccarat and blackjack, it is the shuffle of a standard deck of playing cards; and in roulette, it is the spin of a wheel and the toss of the roulette ball.[10]

A second unusual aspect of a gambling contract is that the economic outcome of the gambling contract, which is based on the random event, almost without exception, will over time favor the casino.[11] This is because an advantage is built into every house-banked casino game.[12] This is typically accomplished by the casino paying less than "true odds" on every bet. For example, in roulette, the true odds of winning a bet on a single number is 37:1 because there are 38 different possible numbers that have an equal probability of coming up. The casino, however, only pays 35:1. Therefore, the casino retains a 5.26% advantage over the player.[13] This also can be expressed as the casino having a 5.26% positive expectation over the player or the player having a 5.26% negative expectation.

Probability is at the foundation of the gaming business.[14] Every wager in a casino is designed and calibrated according to the laws of chance to exact a certain percentage of the players' money.[15] This is how the casino makes money.[16] In

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[10] *See* EDWARD THORP, THE MATHEMATICS OF GAMBLING 11, 30, 43-64 (1984); *see generally*, ROBERT C. HANNUM & ANTHONY N. CABOT, PRACTICAL CASINO MATH (2d ed. 2005) (presenting the mathematical odds of prevailing in such games).

[11] HANNUM & CABOT, *supra* note 10, at 20. Exceptions can be found for which the house advantage in a game is not positive, but these are rare. *Id.* A few video poker machines, for example, return greater than 100% to the player if perfect strategy is used. *Id.* Although advantage play and/or cheating methods theoretically can be used to increase the positive player advantage with such games, this article will ignore these anomalies and focus on house-banked games with a positive house advantage.

[12] *Id.*

[13] Assuming a double-zero wheel and except for the five-number bet, in which the house advantage is 7.89%. *Id.*

[14] *Id.* at 1.

[15] *See, e.g.*, OLAF VANCURA, SMART CASINO GAMBLING 31 (1996).

[16] One popular author put it this way: "A casino is a mathematics palace set up to separate players from their money." NICHOLAS PILEGGI, CASINO 14 (1995).

the short run, a player may win or lose, but in the long run the total of all players' losses will exceed the total of all players' wins.[17] Mathematicians call this the law of large numbers.[18]

Several reported cases address the legal aspects of advantage play. These cases, however, have resulted in inconsistent decisions on important controversies such as casinos' rights to exclude advantage players and the legality of advantage play. Moreover, the court cases have not resulted in an analytical basis for consideration of the various legal aspects of advantage play.

This article will discuss advantage play in light of different legal and ethical considerations. It focuses on the relationships between the government, the advantage player and the casino in three contexts. The first context is whether the advantage player should receive any protection form the government to allow him to ply his skills without interference or exclusion by the casinos. In other words, should the advantage player have a right of access to the casino as opposed to the casino's right to exclude the advantage player?

The second context is how contract law should be interpreted in dealing with disputes between casinos and players involving advantage play. Here, the primary decision is whether the courts will require or not require the casino to pay alleged winnings to an advantage player.

The third context is whether the government should criminalize certain forms of advantage play.

Not all advantage play shares similar elements. All advantage play can be placed in one of five categories based on the following factors:

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[17] HANNUM & CABOT, *supra* note 10, at 21-35.

[18] VANCURA, *supra* note 15, at 31. More precisely, the law of large numbers states that in independent repeated trials of the same experiment, the actual proportion of occurrences of an event eventually approaches its theoretical probability. Thus, if the house advantage is positive, the proportion of money wagered that is won by the house will, in the long run, be a positive amount. HANNUM & CABOT, *supra* note 10, at 21-35.

> 1. Is the advantage play consistent with the defined rules of the game?
> 2. Does the advantage player use information readily available to all players, as opposed to attempting to acquire information not readily available to all players, that would provide an advantage in determining or predicting what was intended to be a random event?
> 3. Does the advantage player attempt to take advantage of known errors by the casino?
> 4. Does the advantage player attempt to alter the random event that serves as the basis for the game result?
>
> In light of these factors, the first category of advantage play is when the player uses superior skill in analyzing the game data that are available to all players and where both the players and casinos contemplate the use of such data as part of the contractual relationship. This data is typically covered by the basic rules of the game. This type of advantage play is only applicable to casino games involving some skill. This would include blackjack and video poker.[19]

One court noted that this type of advantage play involves a "highly skilled player who analyzes the statistical probabilities associated with [a casino game] and, based upon those probabilities, develops playing strategies which may afford him an advantage over the casino."[20] The best and most prevalent example of this category would be the card counter in blackjack who has acquired skill in analyzing the cards played and can then determine when he acquires a theoretical advantage over the casino.[21] In blackjack, the basic rules provide that the

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[19] An exception to this is progressive slot machines. Although the play of these machines involves no skill, the player expectation changes because the progressive meter and potential payout changes, and so there is skill involved in calculating the player expectation and frequency of the payout for progressive slots. *See, e.g.*, DAVID SKLANSKY, GETTING THE BEST OF IT 199-212 (2001).

[20] Bartolo v. Boardwalk Regency Hotel Casino, Inc., 449 A.2d 1339, 1343 (N.J. Super. Ct. Law Div. 1982).

[21] *See* MARKS, *supra* note 1, at 101-15. Although the overall house advantage in a typical blackjack game is positive, the advantage shifts back and forth between player and house as cards are removed from play. *Id.* at 104-05. Simply put, card counting systems identify those hands on which the player has the ad-

player shall initially receive two cards and, based on the value of those cards, make decisions as to whether to hit, stand or take other actions.[22] Therefore, the game rules anticipate that the player will use the data.

The second category of advantage play is when the player uses superior skill in analyzing the data that are available to all players but such data are not part of the basic rules of the game but can impact outcome. An example of this is shuffle tracking, which will be discussed later, where the player predicts the order of the cards in the deck based on the location of the cards in the discard rack and how the dealer shuffled the deck. All the factors necessary to conduct shuffle tracking are available to all players, but the shuffle tracker is attempting to defeat the random event that defines the game. The basic contract between the player and the casino contemplates that the shuffle will be random. Therefore, a player who tracks the shuffle is gaining an advantage outside the basic rules of the game.

The third category of advantage play is when the player takes advantage of the casino's mistakes. This could include errors made by the casino in posting its terms and conditions or by taking advantage of malfunctioning gaming devices that either pay too much or too often. An example of this would be a person that trolls the casino floor at a grand opening seeking slot machines that are mislabeled as to the amount of the jackpot where the error favors the player.

The fourth category of advantage play is where the player acquires knowledge, not typically or readily available to other players, that provides an advantage in determining or predicting what was intended to be a random event. An example would be a blackjack player that is able to learn the dealer's hole card before having to make a decision on how to play his hand.[23] This category of advantage play also is outside the defined rules of play.

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vantage; in these situations, the card counter then increases the bet size. *Id.*

[22] JIM KILBY & JIM FOX, CASINO OPERATIONS MANAGEMENT 139 (1998).

[23] MARKS, *supra* note 1, at 113.

The fifth category of advantage play is where the player alters the random event to his favor. Examples of this would be where the player tries to manipulate the dice at the craps table so that they result in a combination that favors the bets placed by the player. Whether this category of advantage play is cheating has been the subject of inconsistent court decisions.[24]

## Defining Casino Cheating

Most cheating at casino games is a form of advantage play where the purpose of the cheating is to overcome the mathematical advantage that is built into every house-banked casino game. But, not all forms of advantage play are cheating.[25]

Cheating usually involves one of three major distinct situations.[26] The first two major types of cheating involve criminalizing the player's acts to defeat the major condition of all gaming contracts, to wit, the random event. The first form is to alter the selection of outcome, by eliminating the random outcome of the event that determines the outcome of the contract. Altering the selection of outcome can be accomplished in different ways in different games. More colorful methods may include the use of loaded dice in a craps game or marking cards in blackjack. Switching a prearranged deck of cards with a deck used in the game is another form of this type of cheating.[27] This type of cheating, known as a cooler, usually requires the aid of at least one casino employee.[28] A person also may attempt to alter or misrepresent the outcome of a game or event after the outcome is made sure, but before the casino reveals it to the players wagering on the game.[29] For

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[24] *See infra* notes 96-110, and accompanying text.

[25] MARKS, *supra* note 1, at 101.

[26] While cheating in the context of non-gaming activities is theoretically no different than cheating at casino games, most casino states have adopted special statutes to cover casino crimes. *See, e.g.*, NEV. REV. STAT. 465 (2001). While many reasons may exist for creating special statutes, the myriad of different methods of cheating can explain the need for specific legislation to address each methodically.

[27] MARKS, *supra* note 1, at 166-81.

[28] *Id.*

[29] NEV. REV. STAT. 465.070(1) (2001).

example, during a card game it is unlawful to switch cards with another person.[30]

Neither the public nor the courts tend to have a problem understanding this basic form of cheating. As one court noted: "The attributes of the game—its established physical characteristics and basic rules—determine the probabilities of the game's various possible outcomes. Changing these attributes to affect the probabilities is a criminal act."[31]

The second form is to acquire "knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game."[32] Types of this form of cheating include card marking and crimping. A card marker can alter the backs of cards, and figure out the value of the dealer's hole card in blackjack.[33] Knowledge of the dealer's hole card assures the player of an advantage over the casino.[34] Another unlawful activity relating to cards is "card crimping," which is the act of deforming a card, often by bending the corners, to make the point value of the card readable to the crimper from the back and the face of the card.[35]

A third major form of cheating against a casino is to increase or decrease the amount of one's wager after learning the result of the random event. A skilled cheater can increase or decrease his bet after the game ends. A cheater with a losing hand in blackjack, for example, can "pinch the bet" by palming one chip in the stack wagered. If the cheater adds a chip after

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[30] For example, the Nevada Supreme Court held that blackjack players who switch or change cards dealt in any manner to use and play different cards than those dealt to him, or who offer cards back to the dealer for payoff either as a winning hand or because the dealer "broke," violate the law. Moore v. State, 692 P.2d 1278-79 (Nev. 1984), *overruled on other grounds by* Talancon v. State, 721 P.2d 764 (Nev. 1986).

[31] Sheriff of Washoe County v. Martin, 662 P.2d 634, 638 (Nev. 1983).

[32] NEV. REV. STAT. 465.070(2) (2001).

[33] *See generally* BILL ZENDER, HOW TO DETECT CASINO CHEATING AT BLACKJACK (1999) (discussing cheating at blackjack from another perspective—how a casino can cheat the player).

[34] MARKS, *supra* note 1, at 38.

[35] NEV. REV. STAT. 465.083 ("It is unlawful for any person, whether he is an owner or employee of or a player in an establishment, to cheat at any gambling game."); *see also id.* § 465.015; *Martin*, 662 P. 2d 634.

learning that he has a winning hand, he pressed or past-posted the bet.[36]

A necessary element to all forms of cheating is the presence of intent. Uniformly, the courts have required scienter or fraudulent intent as an element of cheating.[37]

## TYPES OF ADVANTAGE PLAY

### *Category One Advantage Play: Using Superior Skill in Analyzing Factors Within the Game Rules that Are Available to All Players*

### Card Counting

Advantage play is often associated with card counting in the game of blackjack.[38] A card counter is a person who counts the value of cards played to figure out when the remaining cards in the deck are favorable to the player (such as when it contains more Tens than usual), at which point he increases his wager.[39]

Card counters track the value of the cards because as current cards are removed from the deck, the player's chances of winning the remaining hands played from that deck can increase or decrease depending on the cards previously played.[40] This can be measured by adjusting the expectation that the player has of winning future hands. The following table "shows the change in [a] player's expectation from basic strategy by removing one card of each value from a single deck."[41]

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[36] Both pressing and past-posting are illegal in Nevada. *See* NEV. REV. STAT. 465.070.

[37] *Id.*

[38] MARKS, *supra* note 1, at 101-15.

[39] *Id.* at 103.

[40] HANNUM & CABOT, *supra* note 10, at 138-40.

[41] *Id.* at 138.

Effects of Removal of Individual Cards[42]
(Change in player's expectation)

| 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | T | A |
|---|---|---|---|---|---|---|---|---|---|
| .38% | .44% | .55% | .69% | .46% | .28% | .00% | -.18% | -.51% | -.61% |

Changes in player expectation in the above table reveal that, generally, removing low cards from the deck will increase the player's expectation while removing high cards will reduce the player's expectation. Thus, when a preponderance of low cards has been played and the remaining deck is rich in high cards, subsequent hands will tend to favor the player. Conversely, if a preponderance of high cards has been played, subsequent hands will tend to favor the dealer. These observations form the basis for card-counting strategies. A player keeping track of the cards that have been played can recognize when the remaining deck is rich in high cards, and can then take advantage of the increase in player expectation at these times by increasing the bet size and/or altering playing decisions. When the remaining deck contains proportionally more small cards, the counter will lower his bet. With proper use of such a strategy, a player can achieve a positive overall expectation (i.e., the casino advantage will be negative).[43]

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[42] *Id.* at 139.

[43] *Id.* at 139. Hannum and Cabot detail some methods of card-counting:

> Dr. Edward Thorp published *Beat the Dealer* in 1962 which explains how blackjack could be beaten using a] memory-based system. [All subsequently devised systems build off this seminar by keeping] track of high and low cards to identify favorable and unfavorable situations. The player then adjusts bet size and strategy decisions accordingly. The systems differ in the point values assigned to particular cards, whether a side count is kept for certain cards (Aces, for example), adjustments for number of decks, and associated strategy. [One such system is Harvey Dubner's] Hi-Lo (or Plus/Minus) count, first proposed in 1963 and later refined by Julian Braun, who used computers to determine the correct playing and betting strategies for the system. This Hi-Lo count system appeared in the second edition of Edward Thorp's *Beat the Dealer* in 1966. In the Hi-Lo count, small cards (2, 3, 4, 5, and 6) are assigned a value of 1, Tens and Aces are assigned a value of -1, and 7's, 8's, and 9's are assigned 0. As cards are revealed through play, the player as-

Several reasons exist as to why a deck rich in high cards favors the player such as:

- Naturals are more prevalent.[44]
- The dealer is more likely to bust when hitting stiffs.[45]

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signs the appropriate value to each and keeps a running total, called the running count, of the values of the exposed cards. [The player divides the running count] by the number of decks remaining in the shoe to get the true count. [This is done by "eyeball" estimating the number of decks remaining, a skill at which proficient card counters are quite good. The player then uses a true count] to make decisions about when to deviate from basic strategy, when to raise and lower the bet, and when to take insurance. When the count is high, the remaining deck is rich in high cards—favorable to the player—and the bet is raised. When the count is low, . . . a preponderance of small cards left [exists] and the [player lowers his bet]. [A] card-counter does not need to memorize each specific exposed card—tracking the sum of the values of these cards is all that is [needed. A player can] accomplish this [by pairing] high (1 value) and low ( 1 value) cards, which cancel to zero, and then total the excess cards.

The Hi-Lo count is a level-1, balanced, single-parameter system. The level of a system refers to the highest absolute point value assigned to any single card. The system is balanced because the sum of the card values for the entire deck is equal to zero. A multi-parameter system is one in which an additional side count is required, such as for Aces. Since no such separate side count is required in the Hi-Lo count, it is a single-parameter system. Despite its simplicity, the Hi-Lo is an effective system advocated by numerous experts. Stanford Wong espouses the Hi-Lo system in his classic book, *Professional Blackjack*, and Bill Zender recommends the Hi-Lo for multiple deck games in his excellent book, *Card-counting for the Casino Executive*. For single-deck games, Zender suggests the Hi-Opt I, another level-1, balanced system that differs from the Hi-Lo in assigning a point value of zero to Aces and 2s. Hi-Opt I can be attributed to Charles Einstein, who proposed a count system in 1968 that was later refined by Julian Braun, an anonymous Mr. G., and Lance Humble and Carl Cooper. A detailed treatment of the Hi-Opt I can be found in Humble and Cooper's *The World's Greatest Blackjack Book*, (1980).

*Id.* at 139-41.

[44] *Id.* "[A]lthough both dealer and player will get more naturals when the deck is rich in Tens and Aces, the player is paid a 3 to 2 premium (the dealer is not). The dealer must hit stiff totals (hard 12-16), and is more likely to bust if there is a preponderance of Tens remaining, whereas the player can choose not to hit these stiff hands." *Id.*

[45] *Id.*

- Player double downs are more effective.[46]
- Player splits are more effective.
- Insurance can be effective.[47]

The edge gained by a card-counter depends on several factors, including the number of decks in play, the penetration (how far into the pack cards are dealt before reshuffling), the rules of the game, the bet spread and the system used. A skilled counter will typically have a 0.5% to 1.5% advantage over the house. More decks and shallow penetration (not dealing very far into the pack before reshuffling) tend to decrease the counter's advantage.[48]

## Video Slot Players

Video poker as played in casinos is a game of mixed skill and chance. In a typical video poker game, the player randomly draws five cards from a deck of fifty-two cards and has the option of keeping or discarding up to all of those cards.[49] For each card discarded, the player will randomly draw an additional card from the cards remaining in the original fifty-two card deck.[50] The combination of cards remaining in the player's hand is compared to a pay chart.[51] If the player has any of the required combinations, he is paid according to the pay chart.[52] The skill element involved in video poker is the

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[46] *Id.* "Player double downs and splits are more effective since the player is often looking for a high hit card in these situations (and also because in many of these situations the dealer's upcard is weak, leading to more dealer busts)." *Id.*

[47] *Id.* "More Tens than usual also means that insurance can be a positive expectation wager for the player. Standard expected value calculations show that insurance is advantageous if more than one-third of the remaining cards are Tens." *Id.* This is because the payoff on the insurance bet is 2-to-1. The expected value calculation when exactly one-third of the remaining cards are Tens is: EV = (+2)(1/3) + (−1)(2/3) = 0.

[48] *Id.* at 140. "Martin Millman, in *A Statistical Analysis of Casino Blackjack*, (American Mathematical Monthly, 1983), estimated that with four decks the counter could gain 1.35% and with six decks 0.91%." *Id.* at 143 n.89.

[49] DWIGHT CREVELT & LOUISE CREVELT, VIDEO POKER MANIA 25 (1941).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 26.

determination of which cards to hold or discard.[53]

Some casinos offer video poker machines that when played at optimum skill pay back more on average than they would collect. The casinos rely on players not being able to play at optimum skill to insure a profit.[54] Despite this, some players can play at optimum skill and have an advantage albeit slight (about .5%) over the casino.

### Progressive Slots

Progressive slots are slot machines in which one or more of the payouts increase by a set amount for each coin or credit played that does not result in the player winning that payout.[55] While slot machines are games of pure chance, on accession the slot machines, typically with progressive jackpots, may provide the player with a positive expectation or advantage.[56] Knowing when a machine with a progressive jackpot provides a positive expectation involves skill.[57] For example, suppose a progressive slot machine has a top payout of $100, and five cents of every dollar bet increases the progressive jackpot. If the player plays the machine for $1 and does not win, the progressive jackpot will increase to $100.05. The progressive jackpot will increase in this way until it is won and will then be reset to its original starting point. If the progressive jackpot increases to a certain point without being won, then the theoretical payout results in a positive player advantage.[58]

> This slight statistical advantage is what attracts the [professional] slot teams. [These are organized and financed teams of professional slot players that attempt to exploit those progressive slots that have a positive player expectation.] Only certain progressive slot machines will meet the

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[53] *Id.*

[54] Becky Yerak, *Greektown Bans 30 Winners: Skilled Video Poker Players Proved Unprofitable for Casino*, DETROIT NEWS, Nov. 25, 2002, *available at* http://www.detnews.com/2002/business/0211/25/a01-19565.htm.

[55] *See generally,* SKLANSKY, *supra* note 19, at 199.

[56] *Id.* at 199-200.

[57] HANNUM & CABOT, *supra* note 10, at 119-20.

[58] *Id.*

> slot team's criteria. First, the number of slot machines that are linked to the progressive jackpot must be manageable. The team needs to monopolize all the slot machines to avoid the risk that a non-member will win the jackpot.[59] [Second, the slot team must know certain fundamental aspects of the machine including its house advantage and frequency of payout for all reel combinations. Third,] the statistical frequency of hitting the progressive jackpot must be consistent with the slot team's bankroll. No slot team has an unlimited bankroll. Based on probabilities, the team needs to have enough cash on hand to play all the [linked] machines [with the progressive jackpot until one team member] hits the progressive jackpot.[60]

The slot team can use the Poisson probability distribution "to determine the probability of hitting the jackpot over the course of a specified number of plays."[61]

> [The Poisson] distribution [named after the 19th century French mathematician Simeon Poisson] is commonly used to calculate the probability of rare events. [As applied] to gaming devices, the probability of X jackpot hits in *n* plays [can be computed using the following formula:]

$$P(X) = \frac{e^{-\mu}\mu^{X}}{X!}$$

> where μ is the average number of jackpot hits over the course of the n plays (or the number of cycles in the n plays), and e is the mathematical constant approximately equal to 2.71828. The value of μ will depend on the particular game and the number of plays, and can be computed by dividing the number of plays in question by the number of plays in a cycle.[62]

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[59] *Id.* at 119-20.
[60] *Id.* at 121-22.
[61] *Id.* at 122 n.69.
[62] *Id.* at 72.

To illustrate, consider a 3-reel, 96 stop per reel slot machine with a cycle of 884,736 plays (96 X 96 X 96) and one jackpot combination. This machine will average one jackpot for every 884,736 plays. The probability the jackpot will not be hit over the course of one cycle ($\mu=1$) is:

$$P(0) = \frac{e^{-1} \times 1^{0}}{0!} = 0.3679$$ [63]

"This implies that 63.21% [(subtracting P(0) from one)] of the time there will be at least one jackpot over the course of a cycle."[64] The probability of no jackpot over the course of any other fixed number of plays can be obtained by replacing the value of $\mu$ with the appropriate average as described above.[65] The following table shows the probability of no jackpot being hit on this example machine for a variety of numbers of plays.

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[63] *Id.* at 73.

[64] *Id.* This probability of hitting the jackpot at least once (or not at all) over the course of one cycle is the same for any single-jackpot machine.

[65] *Id.*

> If reasonable estimates are available for the average number of plays per hour for a given machine, [calculating these probabilities over a given time is possible.] Suppose, for example, an [884,736-cycle] slot machine had not yielded a jackpot in three years. Constant play might produce about 400 decisions per hour, so assuming the machine was played about 50% of the time an average of 200 decisions per hour is reasonable. This activity level translates into a little over 5 million plays for a three-year period. The Poisson formula shows the probability of no jackpot over this many plays to be [0.00263], or about 1 in [380]. If the machine was played constantly at 400 plays per hour for three years, there's only a 1 in [145,000] chance of no jackpot during this time. At an average of 100 plays per hour it would be surprising but possible to see no jackpot in three years: the probability is [0.051 (about 1 in 20).]

*Id.* at 75-76.

Probability of No Jackpot: 884,736-play Cycle Slot Machine

| *Number of Plays* | *Avg. Number of Jackpots* ($\mu$) | *Probability of Hitting Jackpot* | *Probability of No Jackpot* |
|---|---|---|---|
| 1 million | 1.130 | 67.7057% | 32.2943% |
| 2 million | 2.261 | 89.5708% | 10.4292% |
| 3 million | 3.391 | 96.6320% | 3.3680% |
| 4 million | 4.521 | 98.9123% | 1.0877% |
| 5 million | 5.651 | 99.6487% | 0.3513% |
| 6 million | 6.782 | 99.8866% | 0.1134% |
| 7 million | 7.912 | 99.9634% | 0.0366% |
| 8 million | 9.042 | 99.9882% | 0.0118% |
| 9 million | 10.173 | 99.9962% | 0.0038% |
| 10 million | 11.303 | 99.9988% | 0.0012% |

The probabilities in the table above refer to the behavior of an individual slot machine for which the probability of hitting the jackpot on a single play is a little better than one in a million (1/884,736 = .00000113). Over the course of one-million plays on this machine, the probability of hitting the jackpot is 67.7%, with this probability increasing as the number of plays increases. If several machines are considered, the probability that at least one hits the jackpot during the course of a fixed number of plays will be greater than the probability that one specific machine will hit during this same number of plays.[66]

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[66]

[Put another way, for] a given device the probability of an extreme outcome, such as no jackpot for a long period of time or several in a short period, is quite small. With many machines on the casino floor, however, there's a good chance that at least one of them will exhibit extreme behavior. [To see why, consider the example machine in the table above in which the probability of observing no jackpot over the course of three-million plays of this machine is .03368.] For [a] collection of 100 of these machines, the probability they all produce at least one jackpot [when each is played three-million times is (1-.03368)100 = .0325, and so the probability at least one of these yields no jackpot over three-million plays is .9675, or 96.75%.] With a collection of 200 such machines, this

For example, the probability that at least one machine in a carousel of ten of these same type will hit the jackpot during one-million plays on each is (assuming independence) .99998766.[67]

The previous table shows a progressive slot machine that has a cycle of 884,736 and a probability of a little better than one in one million of hitting the progressive jackpot on any given play.

> If the probability of hitting the progressive jackpot is one in ten million [as might be the case on a different machine], the slot team would need an astronomical bankroll to have reasonable assurances that it would hit the jackpot before running out of money. Therefore, slot teams avoid the "mega" jackpot progressive that have very infrequent hits or winners. To minimize their potential exposure, they concentrate on progressive carousels that feature lower jackpots with a higher frequency of payouts.[68]

The team can calculate its risks by determining the size of its bankroll, on average how many pays that the bankroll will finance given the machine's pay-outs on the various reel combinations and the probability of hitting the progressive within this number of plays.[69]

*Category Two Advantage Play: Using Superior Skill In Analyzing Factors Outside the Game Rules that Are Available to All Players*

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probability rises to 99.9%, and with 300 devices, this probability is [99.997%.] Even though there is a small probability that an individual device will exhibit a certain extreme behavior, when a large enough collection is considered, there's a good chance this behavior will appear in at least one of the collection.

*Id.* at 76.

[67] *Id.* at 75-76. Assuming independence, one million plays on each of ten machines is equivalent (probabilistically) to ten-million plays on one machine.

[68] *Id.* at 122.

[69] *Id.* at 121-22.

### Shuffle Tracking

Many commercial gambling games rely on proper randomization to ensure fairness and maintain the desired house advantage or players' win/loss rate. Gaming regulators, for example, acknowledge the importance of randomization in gaming devices such as video poker, slot machines and shuffle machines by requiring that they meet minimum confidence levels on standard statistical tests.[70] Indeed, a primary "regulatory concern is that the device selects the cards or symbols within acceptable levels of randomness."[71]

In card games, the random aspect of the game is the shuffle of the cards by the casino. This is done either by a mechanical shuffler or by hand. Regulatory authorities usually review and approve mechanical shufflers to assure that the outcome of every shuffle will appear random. Non-machine card shuffles are not typically subject to such regulatory scrutiny. A nonrandom shuffling process may alter the odds of a game, if players can use a predictable pattern inherent in the shuffle process as an advantage play.[72]

Shuffle tracking may allow a player to follow segments of cards through a shuffle and by so doing know roughly when these segments will appear during ensuing rounds of play. If such tracking can be employed in a situation when slugs of favorable or unfavorable cards have been identified in the pre-shuffle pack (for example, in blackjack where multi-deck shoe games are quite common), a player could then utilize knowledge of the slug locations during the play of the next shoe by

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[70] AUDIT DIVISION, NEVADA GAMING COMM'N & STATE GAMING CONTROL BD., SCHEDULE OF ASSOCIATED EQUIP. REPORTING & INSPECTION GUIDELINES, *at* http://gaming.nv.gov/documents/word/ae_rpt_insp_guide.xls.

[71] CABOT, *supra* note 7, at 388.

[72] The theory of card shuffling has been studied by numerous authors using mathematical models. *See, e.g.*, PETER GRIFFIN, THE THEORY OF BLACKJACK (1996); David Aldous & Persi Diaconis, *Shuffling Cards and Stopping Times*, 93 AM. MATHEMATICAL MONTHLY 333, 333-48 (1986); Dave Bayer & Persi Diaconis, *Trailing the Dovetail Shuffle to Its Lair*, 2 ANNALS OF APPLIED PROBABILITY 294, 294-313 (1992); J.R. Donner & V.R.R. Uppulini, *A Markov Chain Structure for Riff Shuffling*, 18 SIAM J. OF APPLIED MATHEMATICS 191, 191-209 (1970).

adjusting strategy and bet sizes accordingly. Such shuffle-tracking techniques are not possible, of course, if the shuffle is random.[73]

Given the absence of empirical study in this area, Bob Hannum, one of the authors of this article conducted research into shuffle tracking theory. Using standard casino playing cards, two professional dealers shuffled a variety of six-deck, two-deck and single-decks. Cards were ordered from 1 to $n$ prior to each shuffle iteration and the post-shuffle position recorded for each card. Thus for each iteration of each shuffle procedure, data consists of the permutation array $\pi(1), \pi(2), \ldots, \pi(n))$, where $\pi(i)$ is the pre-shuffle position of the card whose post-shuffle position is $i$.

Six-deck shuffles were chosen to reflect procedures in use at selected major Las Vegas Strip casinos in early 1997. Thirty shuffle iterations were obtained representing six different shuffle procedures (see below for further details). While the data here reflects shuffles executed according to these procedures, inconsistencies exist in dealers' adherence to the house procedure on live games.[74]

A mathematically random shuffle would tend to produce graphs with no apparent pattern. Inspection of the six-deck shuffle plots exposed the striking nonrandom nature of procedures A and F.[75] For procedure A,[76] the similarity of the dis-

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[73] Evidence of non-random shuffling as it relates to gambling games can be found in David C. Emanuel & Keneth H. Sutrick, *Non-random Shuffling Strategies in Blackjack*, 17 COMMUNICATIONS IN STATISTICS 2953, 2954 (1988); John M. Gwynn, Jr. & Arnold Snyder, *Man vs. Computer: Does Casino Blackjack Differ from Computer-Simulated Blackjack?* 8 BLACKJACK FORUM 6 (1988); Edward O. Thorp, *Non-random Shuffling with Applications to the Game of Faro*, 68 J. OF THE AM. STATISTICAL ASS'N 842, 844 (1973); STANFORD WONG, PROFESSIONAL BLACKJACK (1994).

[74] For example, a dealer may cut the right pile when the procedure calls for cutting the left pile, or may vary the order and pairing of grabs from left and right piles as in procedure F. The primary six-deck data does not include any "plugging" of cutoffs (unused cards) into the discards as is sometimes now done for multi-deck games. To shed light on this matter, we have included the results of a set of shuffles for one procedure executed using this plugging process.

[75] See appendix for plots of pre- vs. post-shuffle position for each shuffle iteration of the six-deck procedures.

[76] *Procedure A* (Avg. time = 55.6 sec., $s$=12.4, for 7 shuffles)

plays across the twelve iterations suggests that this shuffle is quite predictable. A similar comment can be made for procedure F,[77] though the small sample size of two iterations advises some caution. Given the nature, strength and consistency of the patterns of these two procedures, knowledge of the order of the cards before a shuffle could aid in knowing the order, at least in terms of segments of cards, after a shuffle. The graphs for procedures B,[78] C,[79] D[80] and E[81] reveal a much less

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1. Break to 2 piles.
2. Cut R pile in half.
3. With grabs from each pile: 1riffle, remove bottom third to top of deck, 1 riffle, to cut.

*Note*: L=left, R=right, C=center, RSR=riffle-strip-riffle, RRSR= riffle-strip-riffle-riffle.

[77] *Procedure F* (Avg. time = 90.9 sec., *s*=11.6, for 10 shuffles)
1. Break into 2 piles.
2. Cut L pile only and Strip ½ of L pile
3. Break L into set of 3 piles (L1, L2, L3) and R into set of 3 piles (R1, R2, R3).
4. Crisscross ½-deck grabs from L-set and R-set (for our sample we paired L1&R2, L3&R1, L2&R3) and RSR to 1 pile, to cut.

[78] *Procedure B* (Avg. time = 66.4 sec., *s*=14.8, for 7 shuffles)
1. Break into 2 piles.
2. Cut R pile only.
3. Start a 3rd pile center by grabs from L and R (about ¾-deck each) and 1 riffle.
4. Crisscross with grabs from L and C, R and C, etc., 1 riffle until finished to 1 pile.
5. Break into 2 piles.
6. Cut left pile only.
7. Simple grabs from L and R, 1 riffle (4-5 times), to cut.

[79] *Procedure C* (no times available)
1. Break into 2 piles.
2. Grabs from each strip-riffle into one pile.
3. Repeat 1 and 2.
4. Break into 2 piles.
5. Grabs from each pile, 1 riffle into 1 pile, to cut.

[80] *Procedure D* (Avg. time = 66.4 sec., *s*=6.7, for 8 shuffles)
1. Break into 2 piles
2. Start a 3rd pile center by grabs from L and R (about ¾-deck each) and 1 riffle.
3. Crisscross with grabs from L and C, R and C, etc., 1 riffle each until finished to 1 pile.
4. Break into 2 piles.
5. Simple grabs from L and R, 1 riffle (4-5 times), to cut.

[81] *Procedure E* (Avg. time = 99.2 sec., *s*=15.2, for 6 shuffles)

obvious level of orderliness. Although these visual representations make clear the nonrandomness of shuffle procedures A and F, a detailed statistical analysis will show that all six procedures fail on most tests for mathematical randomness.[82]

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1. Break into 3 piles.
2. Strip-1 riffle each pile (entire) once.
3. Grabs from each of the three piles, then RRSR into 1 pile, to cut.

[82] *See* Appendix B.

Summary Statistics—Six-deck Shuffles

| *Shuffle Procedure* | *Concordance Coeff. W1*[83] | *Table χ2 Value2*[84] | *K-W Test Statistic1*[85] | *Rising Seq. Avg. R* | *Avg. Gap Size (χ2 Value)* |
|---|---|---|---|---|---|
| A (m=12) | 0.932** | 4,752.8** | 229.7** | 25.6** | 23.3 (152,469**) |
| B (m=4) | 0.798** | 211.6** | 72.3** | 84.5** | 82.9 (18,693**) |
| C (m=4) | 0.497* | 94.8* | 20.6* | 62.5** | 60.4 (12,035**) |
| D (m=4) | 0.563** | 164.5** | 46.0** | 78.8** | 77.0 (19,354**) |
| E (m=4) | 0.776** | 586.6** | 103.5** | 86.5** | 84.9 (9,557**) |
| F (m=2) | 0.752** | 513.7** | 85.9** | 64.5** | 62.4 (15,393**)[3] [86] |

* $p < .05$
** $p < .01$

Given casinos have fixed shuffle procedures, when one such procedure results in a non-random shuffle (particularly as non-random as those in the empirical study cited above) an advantage player could observe, then simulate and study this procedure to determine where specific clumps of cards from the pre-shuffle deck will likely be located in the post-shuffle deck. Once this "mapping" from the pre- to post-shuffle decks has been accomplished, a player can utilize this knowledge as a method of advantage play by predicting when favorable and unfavorable cards will be dealt after the (non-random) shuffle

[83] Based on ½-deck segments.
[84] Based on 1-deck segments.
[85] Based on ½-deck segments.
[86] Cells paired due to small expected frequencies.

and then varying bet size and strategy accordingly. This "shuffle tracking" method of exploiting non-random shuffles to identify clumps of favorable or unfavorable cards in the post-shuffle deck has been refined to advantage play techniques such as ace prediction, ace tracking, sequence tracking and key carding.[87]

*Category Three Advantage Play: Taking Advantage of the Casino's Mistakes*

Mistakes in Posting Its Terms and Conditions or Taking Advantage of Malfunctioning Machines

Some advantage players create the advantage by intentionally exploiting mistakes by the casino, its employees or by malfunctioning gaming devices. A good example is the advantage player or team of players that are present on opening nights of any new casino. They understand that errors are most likely to occur when a casino is in the midst of training employees and deploying several hundred or thousand new gaming devices. In an unreported case, a newspaper described the exploits of one such player that began on the opening night of a casino as follows:

> He noticed a bank of slot machines where the payouts for the $100 machines and the $1 machines had been mistakenly reversed. Over the course of several hours, he won $27,000 in cash and comps by collecting $100 machine payouts from the $1 machines.[88]

Other advantage players attempt to find slot machines that are overpaying, in other words, those which have defective software or hardware that results in their receiving more coins than they would otherwise be entitled.[89]

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[87] For an excellent discussion of shuffle-tracking techniques, particularly ace tracking, and the effects of non-random shuffling on the game of blackjack, see, for example, DAVID MCDOWELL, BLACKJACK ACE PREDICTION: THE ART OF ADVANCED LOCATION STRATEGIES FOR THE CASINO GAME OF TWENTY-ONE (2004); ARNOLD SNYDER, THE BLACKJACK SHUFFLE TRACKER'S COOKBOOK (2003).

[88] Rod Smith, *Civil Liberties: Disadvantaged: Casinos, Police Officials Often Intimidate Legal Patrons, Lawyers Say*, LAS VEGAS REV. J. (July 6, 2003).

[89] *See* William Petroski, *Gamblers Suspected of Cheating Iowa Slots*, DES

### *Category Four Advantage Play: Acquiring Knowledge Not Available to Other Players that Provides an Advantage in Determining or Predicting What Was Intended to Be a Random Event*

#### Hole-Carding

Hole-carding is a technique used primarily in blackjack to learn the value of the dealer's hole card before the player needs to make a decision on how to play his or her hand.[90] The advantage derived from hole-carding can be more substantial than card counting.[91]

Most hole-carding is done intentionally. One surveillance expert described a typical team that took advantage of a weak dealer.[92] In that case, the team consisted of two people.[93] One person was in the "third base side," meaning the seat nearest to the dealer's right hand, and the other in the first spot, nearest the dealer's left hand.[94]

> Not only was the third base player slouching in his seat, his signals to the other player were simple.
>
> The hole-carder on the third-base side of the game had a stack of green ($25) chips and red ($5) chips. To signal stand, he touched the red (stand/stop), to signal hit, he touched the green (hit/go) and for insurance he tapped the green stack with a chip pinched between his fingers to represent an 'I' (insurance). The dealer later was proven to be a weak dealer and not in the group.[95]

"In the case of the player sitting on the third base side, slouching, he was right 74 percent of the time at reading the

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MOINES REG., June 15, 2004, *at* http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20040615/NEWS01/406150340/1001/NEWS&lead=1.

[90] MARKS, *supra* note 1, at 113.

[91] *Id.*

[92] Douglas Florence, *Advantage Play: Blackjack, What Are We Overlooking?*, GLOBAL GAMING BUS., July 2004, at 19.

[93] *Id.*

[94] *Id.*

[95] *Id.* (emphasis omitted).

hole card."[96] If a person knows the dealer's hole card, the player has an advantage over the casino through having additional information to figure out whether to double his bet, surrender a hand (thus, only losing half a bet), or determining whether to hit or stand.[97] The impact that "hole-carding" has on the house advantage will vary depending on the advantage player's proclivity to correctly identify the hole card and to what advantage he uses the information. If the player knows the dealer's hole card every time and played every hand to maximum advantage, it would result in a 10% advantage over the house.[98] The typical advantage player, however, would not play to maximum advantage because, for example, hitting a 19 against the dealer's 20 would be too suspicious and draw inquiry.[99]

"Shining" is a form of hole-carding where the player learns the dealer's hole card by using any reflective device.[100] This could include a metallic cigarette lighter, a facet on a ring, a polished fingernail, or a small mirror.[101]

*Category Five Advantage Play: Altering the Random Event to the Player's Favor*

While the differences between cheating and advantage play may appear simple, various courts have struggled with the distinction particularly in dealing with certain forms of categories two, three, four and five advantage play. In each case, the ultimate question becomes how far a player can go to exploit a casino's errors, omissions or other vulnerabilities before such activity should be a crime. Category five advantage play, how-

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[96] *Id.*

[97] *Id.* To cover these possibilities, statutes often state that a person may not place, increase, or decrease a bet or decide course of play after acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game. *See* NEV. REV. STAT. 465.070(2) (Michie 2001).

[98] *See* Florence, *supra* note 92, at 20; STANFORD WONG, BASIC BLACKJACK 220-21 (1992).

[99] WONG, *supra* note 98, at 220.

[100] *See, e.g.,* BILL ZENDER, HOW TO DETECT CASINO CHEATING AT BLACKJACK 110 (1999).

[101] *Id.*

ever, would appear to clearly meet all the elements of casino cheating but have still created conflicting court decisions.

### Slot Handle Manipulation

While no longer a relevant concern to the casino industry because of advanced technologies, slot handle manipulation was the basis for significant litigation.

The "cherry squeeze" or "handle popping" involved the handle manipulation of mechanical or electro-mechanical slot machines to control the reel alignment.[102] The facts of one case revealed that a player pulled the slot machine handle down two-thirds with his right hand, and then gently hit the handle with his left hand.[103] This activity did not damage the machine. By using this technique, the manipulator stuck two reels on the payout line while the other one was spinning, thus setting the machine up for a jackpot.[104]

In a series of cases involving slot handle manipulation, the Nevada Supreme Court reached surprising decisions.[105] The court held that "handle popping" was not covered by the criminal statute prohibiting the altering of the outcome of a random event because "[t]he physical characteristics and potential pay offs of slot machines are not altered by handle manipulators."[106]

### Dice Sliding

The Nevada Supreme Court did not follow the same reasoning as slot manipulation in a case involving dice sliding.[107] In craps, players are given the opportunity to "toss" two dice that will result in numbers from 2 to 12, although these numbers come up with different frequencies.[108] This "toss" is the

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[102] *See, e.g.*, Childs v. State, 864 P.2d 277, 277-78 (Nev. 1993).

[103] *Childs*, 864 P2.d at 222 n.3.

[104] *Id.*

[105] Skipper v. State, 879 P.2d 732, 734-35 (Nev. 1994); *Childs*, 864 P.2d at 284; Lyons v. State, 775 P.2d 219, 222 (Nev. 1989).

[106] *Lyons*, 775 P.2d at 222.

[107] *See Skipper*, 879 P.2d at 734.

[108] ANDREW BRISMAN, AMERICAN MENSA GUIDE TO CASINO GAMBLING: WINNING

random event upon which the gaming contracts between the casino and the players at that table will be decided.[109] In dice sliding, the skilled player is able to slide one or both dice across the table rather than tossing them and allowing them to roll.[110] Thus, a predetermined "roll" may be chosen and the outcome of the game manipulated by the slider.

In *Skipper v. State*, a dice slider challenged his cheating conviction on the same ground as that raised by the handle popping slot players in the earlier handle popping cases.[111] Claiming that the criminal statutes[112] were unconstitutionally vague,[113] Skipper argued that the statutes failed to alert the average dice player that dice sliding constituted criminal conduct.[114]

The Nevada Supreme Court rejected the argument finding that the rules of craps clearly require a roll of the dice (the random event that is the basis of the contract).[115] As the dice do not roll when they are slid, dice sliding violated the rules of the game and, as such, the average player should be on notice that sliding violates the anti-cheating statutes.

Again, the basis of the crime of dice sliding is that the person *intentionally* slides the dice to impact the random element of the game.[116] If a player improperly throws the dice so that they slide instead of being rolled, the condition of a random event would not be met, and the dice would be thrown again.[117] The thrower, however, has committed no crime.[118]

Dice sliding should be contrasted with dice setting. The

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WAYS 124 (1999)

[109] *Skipper*, 879 P.2d at 734.

[110] MARKS, *supra* note 1, at 198.

[111] *Skipper*, 879 P.2d at 732.

[112] NEV. REV. STAT. 465.070(7), 465.083 (Michie 2001).

[113] In *Lyons v. State*, the defendant challenged a Nevada statute that defined cheating to include "alter[ing] the selection of criteria which determine: (a) The result of a game; or (b) The amount or frequency of payment in a game . . . ." 775 P.2d at 219.

[114] *Skipper*, 879 P.2d at 734.

[115] *Id.*

[116] MARKS, *supra* note 1, at 198.

[117] *See, e.g.*, *Skipper*, 879 P.2d at 734.

[118] *Id.*

latter is a process by the shooter or thrower in a dice game to exert some control over the numbers that the dice will show after they have been tossed.[119] The concept is that the thrower arranges the dice in their hand before throwing them. By controlling (and standardizing) the motion of the throw, dice setters claim to be able alter the random selection of results to favor certain dice combinations that will give them an advantage over the casino.[120]

Dice setting is different than dice sliding because the dice setter is working within the prescribed rules of play to attempt to influence the roll. The casino prescribed the rule with the belief that regardless of what proper method that the advantage player employs, it will not impact the random-aspect of the throw. In other words, the casino considers dice setting to be more based on superstition than science.

## Current Casino Responses to Advantage Play

Because casinos are commercial enterprises, effective advantage players negatively impact net revenues. Some casinos do not take any measures to deal with most advantage players, such as card counters, reasoning that the harm caused does not justify the cost or consequences of taking affirmative action against the advantage players. Other casinos, however, undertake affirmative steps against advantage players where legally available, including criminal arrest, civil exclusion or changing the rules of play. Criminal arrest both removes the advantage player from the casino and serves as a deterrent to other advantage players. As discussed later, this is a limited option that is available only where the type of advantage play employed is specifically illegal.

While some forms of advantage play such as card counting are "not considered cheating, nor . . . illegal,"[121] some casinos routinely exclude suspected advantage players from gaming.

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[119] *What Is Dice Setting?*, *at* http://www.dicesetter.com/setting/setting.html (last visited May 6, 2005).

[120] *Id.*

[121] Uston v. Hilton Hotels Corp., 448 F. Supp. 116, 118 n.1 (D. Nev. 1978).

These casinos may exclude advantage players at their discretion.[122] For example, no Nevada statute requires casinos to admit suspected card counters.[123]

Allowing a casino to bar advantage players and others has a common law origin. "At common law, proprietors of privately-owned places of entertainment and amusement were not obligated to serve the general public."[124] In many states, the major gambling establishments were racetracks. Cases involving exclusion of patrons from racetracks have provided substantial support for this common law principle.[125]

Casinos also may counter some forms of advantage play simply by changing the rules of the game. These countermeasures are often statistically designed to reduce or eliminate the player advantage.[126] For example, any advantage created through card counting, of course, is negated when the deck is shuffled. Possible casino countermeasures against card counting include (1) preferential or at-will shuffling,[127] (2) using

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[122] *Ushton*, 448 F. Supp. at 119 (holding exclusion did not violate federal civil rights laws).

[123] *Id.*

[124] Perry Z. Binder, Comment, *Arbitrary Exclusions of "Undesirable" Racetrack and Casino Patrons: The Courts Illusory Perception of Common Law Public/Private Distinctions*, 32 BUFF. L. REV. 699, 699 (1982).

[125] *See, e.g.*, Watkins v. Oaklawn Jockey Club, 86 F. Supp. 1006 (W.D. Ark. 1949), *aff'd*, 183 F. 2d 440 (8th Cir. 1950); Phillips v. Graham, 427 N.E.2d 550 (Ill. 1981); James v. Churchill Downs, Inc., 620 S.W.2d 323 (Ky. Ct. App. 1981); Tropical Park, Inc. v. Jock, 374 So. 2d 639 (Fla. Dist. Ct. App. 1979); Nation v. Apache Greyhound Park, Inc., 579 P.2d 580 (Ariz. Ct. App. 1978); Presti v. N.Y. Racing Ass'n, Inc., 363 N.Y.S.2d 24 (1975).

[126] *See Countermeasures*, *at* www.urbino.net/V1/pages/ar3_4.htm (last visited May 6, 2005) (Urbino is a website hosted by longtime casino executive Andrew McDonald) [hereinafter *Countermeasures*].

[127] *See generally*, BILL ZENDER'S CARD-COUNTING FOR THE CASINO EXECUTIVE (1990) (discussing other countermeasures casinos can implement). "The shuffle-at-will occurs when the dealer is instructed to reshuffle prior to the cut-card manner because the casino card-counting team has determined that the shoe is player-favorable and card-counters are suspected to be playing at a given table." Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518, 525 (D.N.J. 1998). New Jersey Casino Commission Regulations specifically permit shuffling at will. New Jersey Casino Commission Regulation 19:47-2.3(i) provides:

> After the cards have been shuffled . . . , a casino licensee may, in its discretion, prohibit any person, whether seated at the gaming table or

multiple decks,[128] (3) changing maximum bet or restricting the bet size to the table minimum for new players to the game,[129] (4) having shills occupy all other seats at the table, (5) limiting players to a single wager,[130] (6) prohibiting players from joining game in midshoe,[131] (7) short cut—placing cut card further from back,[132] and (8) using an automatic shuffler or a continuous shuffling shoe.[133]

Technology also has evolved that could allow casinos to achieve advantages over the advantage player.[134] One example is the use of "smart" gaming tables.[135] These tables can use a variety of technologies to track wagers made, cards dealt, and payouts.[136] For example, one smart table can track every card that is dealt out of a shoe in the game of blackjack.[137] This table potentially could be used by a casino to call for a

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> not, who does not make a wager on a given round of play from placing a wager on the next found of play and any subsequent round of play at that gaming table unless the casino licensee chooses to permit the player to begin wagering or until a reshuffle of the cards has occurred.

*Id.*

[128] *See Countermeasures*, *supra* note 126.

[129] *Id.*

[130] *Id.* New Jersey Casino Commission Regulation 19:47-2.14 specifically authorizes this countermeasure. It provides, "A player may only wager on one box at a Blackjack table unless the casino licensee, in its discretion, permits the player to wager on additional boxes."

[131] *Countermeasures*, *supra* note 126. New Jersey Casino Commission Regulation 19:47-2.5(a) provides, "Immediately prior to commencement of play, after any round of play as may be determined by the casino licensee and after each shoe of cards is dealt, the dealer shall shuffle the cards so that they are randomly intermixed."

[132] *Countermeasures*, *supra* note 126. Some casinos may use two cut cards. The first at about 50% penetration and the second at about 85%. If the casino suspects that a card counter is playing, it will initiate the shuffle at the first cut card. *Id.*

[133][133] Florence, *supra* note 92, at 18.

[134] *See* Andrew Glazer, *Technology Thwarts Sneaky Gamblersm* DET. FREE PRESS, Nov. 3, 2000, *available at* http://www.freep.com/news/casinos/game3_2000 1103.htm.

[135] *Id.*

[136] *Id.*

[137] *Id.*

reshuffle anytime the deck favors the advantage player.[138]

Likewise, strategies are available for slot teams that play progressive slot machines with a positive player expectation. One strategy is for the casino to retain the discretion to limit players to playing one machine.[139] "Thus, when a slot team tries to monopolize a carousel, they will need more team members and incur greater expense in doing so."[140]

Another strategy is

> to reduce the increment with which each play of the slot machine will increase the progressive jackpot. If, for example, five cents of every dollar normally goes to fund the progressive, this can be reduced to one cent. This substantially increases the risk to the slot team organizer because he will not receive as much of his money back in the form of the jackpot.[141]

Therefore, the jackpot has to be higher before positive player expectation justifies risking the team bankroll.[142]

## How Law and Regulation Address Advantage Play

### *Protected Right of Access to Casino Games of Advantage Players Have*

Advantage players have have attempted to use constitutional and statutory protections against discrimination to create a right to gamble. Advantage players have alleged that their exclusion violates the federal civil rights statutes and the Fourteenth Amendment to the United States Constitution.[143] Federal courts have rejected these arguments.[144] A casino in a typical case would refuse to allow the card counter to play

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[138] *Id.*

[139] MARKS, *supra* note 1, at 123.

[140] *Id.*

[141] *Id.* Of course, the casino cannot misrepresent what portion of each pull goes toward the progressive jackpot.

[142] *Id.*

[143] *See* Uston v. Airport Casino, Inc., 564 F.2d 1216 (9th Cir. 1977) (per curiam); Uston v. Hilton Hotels Corp., 448 F. Supp. 116 (D. Nev. 1978).

[144] *Hilton Hotels Corp.*, 448 F. Supp. at 116.

blackjack and request him to leave the premises permanently.[145] Casino security would escort him to the exit and read him the state trespass statute.[146] The card counter would then allege this conduct was done under color of state law, and, thus, violated his civil rights.[147]

These were precisely the federal law issues raised and rejected in the ruling of federal courts in both Nevada (*Uston v. Hilton Hotels Corp.*) and New Jersey (*Doug Grant, Inc. v. Greate Bay Casino*).[148] Each of these courts held that card counters failed to state any federally-recognized cause of action, i.e. that summary judgment was appropriately entered on behalf of the defendant casinos.[149]

To maintain a successful civil rights claim, the complaining party must show that the conduct deprived him of a right under the United States Constitution or federal law.[150] Actions maintained directly under the Due Process and Equal Protection Clauses of the Fourteenth Amendment also require a showing of "state action" and violation of a constitutional right.[151]

"State action" means the state government had significant and direct involvement in the challenged activity.[152] Private

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[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Hilton Hotels Corp.*, 448 F. Supp. at 116; *Doug Grant, Inc.*, 3 F. Supp. at 518. In 1984, a federal district court in New Jersey held that a person cannot maintain an action against a casino for exclusion based on being a card counter. The court reiterated the prior holding that violations of a person's constitutional guarantees of personal rights under the federal constitution require state action. Hoagburg v. Harrah's Marina Hotel Casino, 585 F. Supp 1167, 1171 (D. N.J. 1984).

[149] *See supra* notes 127-48 and accompanying text.

[150] Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 924 (1982); Halet v. Wend Inv. Co. 672 F.2d 1305, 1309 (9th Cir. 1982).

[151] Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982).

[152] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974); Moose Lodge No. 107 v. Irvis 407 U.S. 163, 172 (1972). Section 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

conduct, such as excluding card counters from a casino, can be action taken under color of state law where the alleged infringement of a federal right is fairly attributable to the state.[153] The more connections a purportedly private action has with some kind of state activity, rule or actor, the more the private action will be considered attributable to the state. Several early court actions were initiated by the late Ken Uston, a well known card counter and author.[154] Uston asserted that private entities excluding card counters from a casino constituted state action if the conduct is "fairly attributable to the state."[155]

In the *Hilton Hotels Corp.* case, Uston asserted that the casino's actions were tantamount to state action, "(1) because of the extent to which the state of Nevada regulates the gaming industry, and (2) because the State of Nevada, charged with the enforcement of the gaming laws, has refused to prohibit the discrimination against card counters."[156]

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rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.S. § 1983 (2000).

[153] *Lugar*, 457 U.S. at 924; *Rendell-Baker*, 457 U.S. at 837; *Jackson*, 419 U.S. at 349; *Moose Lodge No. 107*, 407 U.S. at 172. A private party can meet the "state action" requirement where "there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

[154] *See, e.g.*, KEN USTON, BILLION DOLLAR BLACKJACK (1981).

[155] *See Rendell-Baker*, 457 U.S. at 838.

[156] *Hilton Hotels Corp.*, 448 F. Supp. at 118. Other grounds for alleging state action are as likely to fail. For example, Nevada Revised Statutes 465.083 makes it unlawful to operate a cheating or deceptive game. NEV. REV. STAT. ANN. 465.083 (Michie 2001). An advantage player may allege that by excluding competent gamblers (card counters) the casinos were operating a deceptive game. Nevada Revised Statutes 465.101 provides a "shopkeeper's privilege" to casinos to detain persons suspected of defrauding or cheating a casino in a gambling game without incurring civil or criminal liability. *Id.* § 465.101. An advantage player may argue that the casino personnel are therefore agents of the state in regard to the enforcement of certain criminal laws. The use of a shopkeeper's privilege statute, however, has been held not to amount to state action. White v. Scrivner Corp., 594 F.2d 140, 144 (5th Cir. 1979); Battle v. Dayton-Hudson Corp., 399 F. Supp. 900, 904 (D. Minn. 1975); Warren v. Cummings, 303 F. Supp. 803, 805 (D. Colo. 1969). *But see* El Fundi v. Deroche, 625 F.2d 195 (8th Cir. 1980) (holding

Mr. Uston was also unsuccessful in another case where the court found that "there is a lack of 'state action' in the discriminatory conduct he alleges."[157] Mere state regulation of a private industry in and of itself does not constitute state action.[158] "Something more, more in the nature of a substantial and direct state involvement in promoting the challenged activity, must be demonstrated . . . ."[159]

The court concluded that "there has been no demonstration that the State of Nevada, either through its regulation and/or licensing of the gaming industry, has to any significant degree promoted or participated in the exclusion of persons suspected by gaming establishments to be card counters.[160]

After the *Hilton Hotels Corp.* case was decided, the United States Supreme Court again considered the issue of whether mere regulation can constitute state action. In *Rendell-Baker v. Kohn*, the plaintiff alleged that four connections between the state and the private school defendant made the school's conduct in discriminatorily discharging employees a state ac-

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that state action is present when private security guards are acting together with police officers). Likewise, attempting to elevate casino security officers that use state law, such as reading or threatening enforcement of the state trespass act is unlikely to create state action. See Watkins v. Oaklawn Jockey Club, 183 F.2d 440 (8th Cir. 1950).

[157] Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977) (per curiam).

[158] *Rendell-Baker*, 457 U.S. at 844 (White, J., concurring). The United States Supreme Court has noted that state action requires that conduct must be "itself based upon some rule of conduct or policy put forth by the state." *Id.*

[159] *Hilton Hotels Corp.*, 448 F. Supp. at 118. In *Moose Lodge No. 107*, 407 U.S. at 188-89, the state licensed and extensively regulated a private club in its sale of liquor. Without a state license and compliance with the state regulations, the club could not sell liquor and consequently could not effectively operate. *Id.* at 187. The club refused service to a patron on account of his race. *Id.* at 164. The Supreme Court held that such licensing and regulation did not constitute state action for purposes of § 1983. *Id.* at 179; *see also Jackson*, 419 U.S. at 350, (speaking of public utility regulation, the Supreme Court said that the "mere fact that a business is subject to state regulation, even extensive or detailed, does not by itself convert its action into that of the State"); Pavolini v. Bard-Air Corp., 645 F.2d 144, 147 (2d Cir. 1981) (stating extensive governmental regulation of the air transport industry insufficient to treat action by private airline in discharging plaintiff as state action—"regulation, without more, is insufficient").

[160] *Hilton Hotels Corp.*, 448 F. Supp. at 119.

tion.[161] One of the connections argued was the extensive regulation of the school in nearly every aspect by numerous public entities.[162] Although the Court noted, citing *Jackson v. Metropolitan Edison Co.*,[163] that state regulation, even if "extensive and detailed," does not equal state action, the Court went on to specifically contrast the "extensive regulation of the school generally" with the comparatively unintrusive and infrequent regulation of the specific conduct challenged-personnel discharge procedures.[164] This unfortunate dichotomy suggests that where the specific conduct engaged in is highly regulated, the Court may characterize the activity as state action.[165]

The analogy, applying this analysis to the expulsion of a card counter, is that the decision would remain a private one because, despite the extensive regulation of the gaming industry in general, the decision relating to excluding card counters is "not compelled or even influenced by any state regulation."[166] In fact, this was a specific holding in the *Hilton Hotels Corp.* case: "In the case at hand, there has been no demonstration that the state of Nevada, either through its regulation and/or licensing of the gaming industry has to any significant degree promoted or participated in the exclusion of persons suspected by gaming establishments to be card coun-

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[161] *Rendell-Baker*, 457 U.S. at 840-43.

[162] *Id.* at 841.

[163] 419 U.S. 345 (1974).

[164] *Rendell-Baker*, 457 U.S. at 841. This attitude is highlighted in the concurring opinion of Justice White, who wrote separately simply to emphasize this exact point: "For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State. . . . The employment decision remains, therefore, a private decision not fairly attributable to the State." *Id.* at 844 (White, J., concurring).

[165] *Id.* at 841. In *Rendell-Baker*, the pertinent regulations simply required the school to promulgate written job descriptions, personnel standards, and procedures, with few specific requirements imposed. *Id.* at 833. The most intrusive personnel regulation was the requirement that a state committee had the power to approve persons hired as vocational counselors, the position from which Rendell–Baker was discharged. *Id.* The Court held that "[s]uch a regulation is not sufficient to make a decision to discharge, made by private management, state action." *Id.* at 842.

[166] *Id.* at 831.

ters . . . ."[167]

The opinions in the *Hilton Hotels Corp.* case and of the Supreme Court of the United States in *Rendell-Baker* contemplate that if the exclusion decision "was itself based upon some rule of conduct or policy put forth by the state,"[168] then the decision to exclude would be fairly attributable to the state. That is, if the state gaming regulators elected to promulgate a regulation controlling the expulsion of card counters, the potential liability of the casinos for civil rights violations would multiply.

In 2000, the issue of state action resurfaced in federal court in New Jersey. While *Doug Grant, Inc.* was decided under the Equal Protection and Due Process Clauses of the New Jersey Constitution, the federal appellate court analysis in dismissing the constitutional and civil rights claims of the plaintiff card counters was consistent with federal law.[169]

The court based the decision that the casino's countermeasures did not constitute violations based on three considerations. First, state regulation and the state gaming regulator's "authorization of casino activities do not transform the casinos into state actors."[170] State action is necessary to establish a constitutional violation under state and federal equal protection and due process clauses. Second, even if the equal protection clause applied, the court found that a rational basis would exist for allowing casinos to discriminate against card counters through the use of countermeasures based on "the legitimate state interest in protecting the financial viability of the casino

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[167] *Hilton Hotels Corp.*, 448 F. Supp. at 119. By so ruling, Judge Foley rejected Uston's position that Nevada Revised Statutes 463.151 (excluding certain people—mainly criminals—from casinos) shows specific regulation in the subject area. In *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 373 n.3 (N.J. 1982), the court specifically declined to determine whether a parallel New Jersey statute, standing alone, gave the New Jersey Commission the regulatory power to exclude card counters.

[168] *Rendell-Baker*, 457 U.S. at 844 (White, J., concurring).

[169] Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 189-90 (3d Cir. 2000).

[170] *Doug Grant, Inc.*, 232 F.3d at 189.

industry."[171] Finally, the court held that the "opportunity to gamble" was not a constitutionally-protected property interest that could be the basis for a due process claim.[172]

In summary, a card-counter cannot establish a § 1983 civil rights case without a showing that the state was substantially involved in the challenged activity.[173] The *Hilton Hotels Corp.*

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[171] *Id.*

[172] *Id.* at 189-90.

[173] If a plaintiff can show that a combination of alleged discriminatory activities should have been considered, but was not, then the same activities can be realleged again, and not be subject to dismissal. The recent United States Supreme Court case of *Rendell–Baker* is again instructive. The teacher contended that her discharge by a private school was state action. *Rendell-Baker*, 457 U.S. at 837. The Court analyzed each of the four factors alleged individually, in succession. *Id.* at 840-43. Rendell-Baker argued that the school received substantial public funds (at least 90% of its annual budget) and was therefore dependent on governmental aid; that the school was extensively regulated; that the school was a private group performing the "public function" of education, and therefore substitutes for the state; and, that there was a fiscal "symbiotic relationship" with the state in the sense that the financial health of both were intertwined—where a private party's action occurred in conjunction with a business in which the state may be considered a partner or joint venturer in a profit-making field. *Id.*; *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-26 (1961). After the conclusion of the individual rejection of each of these four factors, the Court immediately held that the petitioner had failed to show state action. *Rendell-Baker*, 457 U.S. at 840-43. Justices Marshall and Brennan, in dissent, clearly apply a collective approach to find more than enough evidence of state action. *Id.* at 844-52 (Marshall, J., dissenting). The Ninth Circuit tends to view state action in the collective. For example, in *Martin v. Pac. Northwest Bell Telephone Co.*, 441 F.2d 1116 (9th Cir. 1971), the plaintiff alleged that state action was involved because (1) the defendant was extensively regulated, and (2) it was a public utility, and thus had near monopoly power as well as state delegated eminent domain powers. *Id.* at 1117. In rejecting plaintiff's cause of action, the court merged the alleged factors when it concluded that because Bell enjoys a public monopoly which is protected and regulated by the state does not necessarily bring its every action within the purview of § 1983. *Id.* at 1118.

The case of *Fulton v. Hecht*, 545 F.2d 540 (5th Cir. 1977), is noteworthy because of its similarity on the facts to the instant question. There, a dog racer sued the owners of a state licensed privately owned racetrack, claiming a refusal to renew his contract to race at the track violated §1983. *Id.* at 541. The Court summarized the plaintiff's arguments on state action:

> He claims state action is present in that the State regulates the dog racing industry, a symbiotic relationship exists between the State and the Kennel Club, the State has granted a monopoly to the Kennel Club and there is imprimatur by inaction due to the failure of the Board of

and *Doug Grant, Inc.* cases are strong and persuasive precedent that such a plaintiff cannot show the requisite state involvement. Thus, advantage players have no right of access created by civil rights or constitutional law.

*Innkeepers Duty*

Card counters, in particular, have attempted to avoid the casino's right to exclude by arguing that it would violate a special duty owed by innkeepers to the public. Innkeepers generally cannot arbitrarily exclude patrons. A federal appellate court rejected the argument that casinos are innkeepers in relation to suspected card counters.[174]

> [Although the casinos] may be innkeepers in the common law sense, they were not acting in that capacity in their dealings with [the card counters]. The relationship was not one of innkeeper and patron, but rather one of casino owner and prospective gambler. The policies upon which the innkeeper's special common law duties rested are not present in such a relationship.[175]

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Business Regulation to act on his complaint regarding termination of his contract [state inaction].

*Id.* The Court of Appeals rejected each of these arguments and dismissed plaintiff's complaint. *Id.* at 543. The court held that mere regulation, even if extensive, is not sufficient, citing *Jackson*, 419 U.S. 345. *Id.* In part, Fulton argued that state licensing of the dog track implicated state action. This argument was rejected in *Fulton*, and elsewhere. *Id.*; *see also* Ouzts v. Md. Nat'l. Ins. Co., 470 F.2d 790 (9th Cir. 1972), *reh'g,* 505 F.2d 547 (9th Cir. 1974); *Watkins*, 86 F. Supp. at 1016 (stating fact that defendant operated a race track under a license from the State did not make its discriminatory actions state actions). The *Fulton* court then considered whether, in addition to the regulation, the Kennel's state granted monopoly status would constitute state action. *Fulton*, 545 F.2d at 543. The court rejected this argument because the specific conduct complained of refusal to renew plaintiff's booking contract was not substantially controlled by the state. *Id.* Additionally, the court found no "symbiotic relationship" because the Kennel Club (like casinos) are not lessees of public property, and because the state was not obligated to repair and maintain the Kennel's facilities. *Id.* at 542-43. The state inaction argument was rejected out-of-hand. *Id.* at 543.

[174] Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977).

[175] *Airport Casino, Inc.*, 564 F.2d at 1217.

RIGHT OF ACCESS CREATED BY GAMING REGULATIONS

Advantage players have special rights in New Jersey that they do not have elsewhere. This is because New Jersey has carved a statutory exception to the common law right of exclusion. Ken Uston argued in both Nevada and New Jersey that since he was not on the respective state's list of persons that must be excluded from the casinos, the casinos had to admit him and allow him to play.[176]

Uston found success in the New Jersey case.[177] There, the court ruled that only the New Jersey Legislature could exclude patrons from casinos.[178] The court recognized that while casinos may have a common law right to exclude, the New Jersey Control Act abrogated that right.[179] The statutory language, relied on by the court, provided that the Commission "shall establish such minimum wagers and other limitations as may be necessary to assure the vitality of casino operations and fair odds to and maximum participation by casino patrons; . . . ."[180] Other portions of the New Jersey Act empowered the Commission to define the rules of all games and their method of operation.[181]

The court noted the New Jersey Act went into great detail in defining the rules of blackjack, and only its Gaming Commission had authority to change those rules.[182] Continuing with this reasoning, the casinos had changed the rules of the game by excluding patrons based upon their method of play or their level of success.[183] The court concluded this intruded on the purpose of the New Jersey Control Act that sought "to assure . . . maximum participation by casino patrons."[184]

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[176] *See generally* Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370 (N.J. 1982); Uston v. Hilton Hotels Corp., 448 F. Supp. 116 (D. Nev. 1978).

[177] *Resorts Int'l Hotel, Inc.*, 445 A.2d at 376.

[178] *Id.*

[179] *Id.* at 375.

[180] *Id.* at 372 (quoting N.J. STAT. ANN. § 5:12-100).

[181] N.J. STAT. ANN. § 5:12-70.

[182] *Resorts Int'l Hotel, Inc.*, 445 A.2d at 373.

[183] *Id.*

[184] *Id.* at 372 (quoting N.J. STAT. ANN. § 5:12-100).

In contrast to New Jersey, the Nevada Gaming Control Act does not contain similar statutory provisions. There is no indication that "maximum participation by casino patrons" is a purpose of Nevada's Gaming Control Act. The New Jersey case did not hold that creating a "List of Excluded Persons" gave all persons not included in it the right to gamble.

A federal district court in Nevada rejected Uston's subsequently successful New Jersey argument.[185] The court stated:

> In essence, [the card counter] argues that since the State of Nevada has enacted measures that require the exclusion of a limited class of undesirable persons, of which [the card counter] is not a member, it thereby undertook the affirmative duty to compel the admittance of all persons, such as [the card counter], who were not named on the list compiled by the Nevada Gaming Commission. Such an argument strains logic. It is the judgment of this court that [Nevada Revised Statutes] 463.151 gives rise to no affirmative obligation by the State of Nevada to compel gaming establishments to admit persons thought to be card counters.[186]

Nevada, however, recognizes an exception to the general rule that you can ban advantage players. This exception is for slot teams that play progressive slot machines. Casinos do not like slot teams because they win large jackpots that would otherwise go to their regular players. No favorable consequences result from a slot team winning the jackpot. They do not go around telling their friends that they won a large jackpot at a particular casino. Regular players and tourists do not benefit from slot teams. They fuel the progressive jackpots, but are left with no chance to win the big jackpots because they are intimidated away from the machines by the slot teams.

An easy solution would be for the casinos to ban slot teams, just as they can ban card counters. However, this is not possible in some states like Nevada where regulations imply the amount of the progressive jackpot are public funds that are

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[185] *Hilton Hotels Corp.*, 448 F. Supp. at 119.

[186] *Id.*

being held in trust until a member of the public wins the jackpot.[187] While a court would not likely find this regulation to create a right to play slot machines in a casino, many Nevada casinos do not want to incur the costs of a lawsuit to defend their rights to exclude slot teams.

### CONTRACTUAL ASPECTS OF A GAMING CONTRACT

Casino-style wagering is essentially an adhesion contract between the casino and its patrons. A contract is basically "a promise, or a set of promises, that the law will enforce."[188] An adhesion contract is a non-negotiable, take-it-or-leave-it contract.[189] In terms of gaming, the casino defines the terms of the contract (the rules of the wager) and allows patrons to play the game as-is, with no possibility of changing the rules. The nature of gaming necessitates such adhesion contracts. Casinos are in the business of making money. Therefore, the casino typically only enters into contracts that have a statistical advantage favoring the casino. Altering the terms of this contract could change the statistical advantage, such, as by changing the probability of winning or losing the wager.[190]

Because gambling is a contract, the general elements of a contract must exist before there is a binding agreement. At its simplest, the elements of a contract are: offer, acceptance, and consideraion.[191] An offer is an outward manifestation to an-

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[187] This is a questionable proposition based on either law or mathematics. *See supra* notes 311-15 and accompanying text.

[188] E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.1 (3d ed. 2004) (emphasis omitted).

[189] *See, e.g.*, BLACK'S LAW DICTIONARY 342 (8th ed. 2004).

[190] For example, in the game of craps, if you roll a seven after a point is rolled (4, 5, 6, 8, 9 or 10), the game is over and the casino wins. If a patron tried to contract around this by changing the number to 2, this would (in addition to getting the patron laughed at) change the odds of "sevening out" to 1 out of 36 from 1 out of 6, thus severely reducing the chances that the casino will win. If everything else remained constant, the casino would certainly lose in the long run. *See* HANNUM & CABOT, *supra* note 10, at 89. A bet on the pass line with double odds faces a 0.61% house edge. The greater the odds take, the lower the edge. For example, the house advantage is 0.47% with triple odds, 0.33% with 5X odds, 0.18% with 10X odds, and 0.02% with 100X odds. *See, e.g.*, HANNUM & CABOT, *supra* note 10, at 92.

[191] CLAUDE D. ROHWER & ANTHONY M. SHROCKI, CONTRACTS IN A NUSHELL

other of a desire to enter into a contract, which confers upon the offeree the power to make a valid contract.[192] An offer can be manifested by either words or conduct.[193]

The offer is typically the player proffering the wager. For example, in *Campione v. Adamar of New Jersey, Inc.*,[194] the casino posted a sign that lowered the maximum bet on the table to $100.[195] The player placed a bet of $350 and the casino proceeded with the hand.[196] When the player won, the casino was only willing to pay on $100.[197] The court disagreed, holding:

> [t]he casino then had the option to reject the offer by informing [the player] that he had bet above the limit established for the table, and requesting that he lower his bet to a maximum of $100. No casino employee did so. As a result, when the casino allowed [the player] to pursue the hand with his $350 bet, this constituted an acceptance of [the player's] offer. Therefore, a binding contract was formed between [the player] and the casino, and the casino was obliged to pay [the player] the full amount of his winning bet.[198]

In another case, an advantage player attempted to establish a contractual right to gamble by arguing that the casino's advertisement of the game constituted the offer, and his placing of the wager constituted acceptance.[199] Therefore, once he accepted, the contract was formed and the casino could not reject his wager.[200] The court rejected this argument.[201] It

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§ 1.2 (5th ed. 2000).

[192] FARNSWORTH, *supra* note 188, § 3.3.

[193] *Id.* § 3.10.

[194] 643 A.2d 42 (N.J. Super. Ct. Law Div. 1993), *rev'd*, 694 A.2d 1045 (N.J. Super. Ct. App. Div. 1997).

[195] *Campione*, 643 A.2d at 46. Before lowering the maximum bet, the table had a $125 minimum and a $1000 maximum bet. *Id.*

[196] *Id.*

[197] *Id.* Mr. Campione refused the $100 payout and proceeded to bring suit. *Id.*

[198] *Id.* at 49.

[199] Ziglin v. Players MH, L.P., 36 S.W.3d 786, 788 (Mo. Ct. App. 2001) (per curiam). Plaintiff, a suspected card counter, argued that as a member of the general public, the casino's advertisement offered a contract for him to play a game of blackjack. *Ziglin*, 36 S.W.3d at 788.

[200] *Id.*

held that the "[c]asino's advertisements and offering of blackjack were insufficient to constitute an offer that Patron was empowered to accept."[202] "Rather, such advertisements are considered mere invitations to make an offer, to enter into negotiations, or to patronize the advertiser's place of business."[203] The court concluded that "advertisements in general language that are made available to all persons interested in a particular trade or business are not offers that become contracts once a person signifies his acceptance."[204]

In turn, "[a]cceptance can be defined as an action taken by the offeree through either a promise or performance that creates a contract . . . mak[ing] the offeror's promise enforceable."[205] Acceptance in the casino contract context is typically the casino accepting the bet.

Even if the player succeeded in establishing that the placing of the wager was acceptance, he would have difficulty establishing a right to continue to play after the first hand if the casino then rescinded the offer.

The third element, consideration, is what will determine which promises will be enforceable. Consideration is essentially something that a person had to bargain for. "[I]n simplest terms, [consideration] denotes the receipt by the promisor of 'something of value' from the promisee."[206]

What is most important to casino contracts are enforceable promises and their terms and conditions. The casino is essentially promising that if certain random conditions occur, the casino will pay the patron a predefined amount of money. "By doing the act required by the rules, the patron accepts the offer

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[201] *Id.* at 789.

[202] *Id.* at 789-90.

[203] *Id.* at 789.

[204] *Id.*

[205] Zachary M. Harrison, *Just Click Here: Article 2Bs' Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 916 (Spring 1998); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

[206] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 12 (4th ed. 2001).

and creates a unilateral contract."[207] The patron is giving up a certain amount of money for the chance to win a prize. Therefore, the consideration constitutes this exchange between the casino and the patron.

The terms of a gambling contract are both express and implied.[208] The express terms are those that are stated in writing. For example, most craps tables say that if you place a bet on twelve and twelve comes up, the casino will pay thirty-one to one.[209] Many games also have implied terms, that is, terms that are not written down but are still a part of the contract. For example, a craps table does not tell you that if you roll a seven after rolling a point, you lose; however, this rule is commonly understood and forms the basis for the game of craps.[210]

Countermeasures employed by the casino can be either implied by law or created by express terms of the contract. The adoption by the legislature of laws allowing such countermeasures or of regulations by the gaming regulators can become implied terms of the gaming contract between the casino and the patron.[211] Absent such implied terms, the use of countermeasures can become express terms by either signage or incorporation into the official written rules of the casino that are available to the patron.[212]

Other implied terms in contracts are not unique to gaming. The implied covenant of good faith and fair dealing is of particular importance in the context of advantage play. Every contract contains an implied covenant of good faith and fair dealing.[213] The covenant requires that neither party to a contract do anything that will injure the right of the other party to receive the benefits of their agreement.[214]

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[207] LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 300 (3d ed. 2000)
[208] *Id.*
[209] HANNUM & CABOT, *supra* note 10, at 96.
[210] VANCURA, *supra* note 15, at 135.
[211] *See* RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).
[212] *Id.*; *see also* Sengel v. IGT, 2 P.3d 258, 262 (Nev. 2000).
[213] 17A C.J.S. *Contracts* § 346.
[214] *See, e.g.*, Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919,

*Statutory and Regulatory Aspects of a Gaming Contract*

The legal context in which courts must consider advantage play extends beyond mere contractual concerns. Contractual rights and obligations of parties can be superceded by statutory laws. In the gaming industry, these statutory laws are often implemented by governments to assure the honesty and fairness of the games and to protect the player.[215] These statutes and regulations can impact the terms and conditions of the contract between the casino and the player in many ways.[216] For example, the law can and often does hold gambling contracts void and unenforceable. In less dramatic ways, the law can dictate mandatory terms of a contract between a casino and a patron, such as requiring that the casino must pay out a minimum average return on wagers (such as 75% in slot machines) or actually dictating the exact terms of the contract by statutorily setting the rules on how the games must be played.[217]

Integrity is an important regulatory concern for two reasons. First, the government has an interest in protecting patrons from being cheated or taken advantage of by unscrupulous operators. In most cases, only the government has the ability to have access to the information necessary to assure fairness and honesty. Second, the well-being of the entire industry is dependent on the public perception that it is fair and honest. In Nevada, a primary regulatory policy objective is to "instill public confidence and trust that the games are honest and fair."[218] Additionally, the Nevada Gaming Control Board's list of gaming scams includes "altering the random selection

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922-24 (Nev. 1991).

[215] HANNUM & CABOT, *supra* note 10, at 237.

[216] JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 98 (4th ed. 2001) (discussing illegal wagers and bargains against public policy).

[217] CABOT, *supra* note 7, at 96. Regulations can have either a direct impact, requiring minimum paybacks, or an indirect impact, imposing costs or restricting entry into the market, on the gaming industry. *Id.*

[218] Keith Copher, Address at the Nevada Gaming Control Board, Casino Regulatory Compliance Conference (Aug. 17, 2000).

process of the gambling game."[219] Thus, gaming regulators require evidence that slot combinations are selected randomly, cards are dealt from a shuffled deck, the rolls of the dice result in random outcomes, the house advantage is within acceptable limits and the casino is keeping only its fair share of the money wagered.[220] These considerations are inherently mathematical—establishing randomness (or the lack thereof) requires statistical proof and determining a game's advantage involves mathematical arguments.

> While regulation attempts to achieve many goals, most regulatory systems share common objectives: keep the games fair and honest and assure that players are paid if they win. Fairness and honesty are two different concepts. A casino can be honest but not fair. Honesty refers to whether the casino offers games whose chance elements are random.[221]

Randomness may be defined here as the observed unpredictability and absence of pattern in a set of elements or events that have definite probabilities of occurrence.[222] For example, a slot machine is honest if the outcome of each play is not predetermined in the casino's favor.[223]

"Fairness refers to the game advantage—how much of each dollar wagered should the casino be able to keep?"[224] For example, a slot machine is not fair if it retains on average 90% of

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[219] *Id.*

[220] *See* HANNUM & CABOT, *supra* note 10, at 249-55.

[221] *Id.* at 206. A British government-sponsored, wide-ranging review cites three reasons to regulate gambling: (1) keeping crime out of gambling, (2) fairness to the punter, and (3) protecting the vulnerable DEPARTMENT FOR CULTURE, MEDIA AND SPORT, GAMBLING REVIEW REPORT, at 15-17 (Gr. Brit. 2001), *available at* http://www.culture.gov.uk/global/publications/archive_2001/gam_rev_report.htm.

[222] This is the language used in NEVADA GAMING COMM'N REG. 14.010(9). Similar language is used in other states. In Colorado, for example, randomness means "the unpredictability and absence of pattern in the outcome of an event or sequence of events," 1 COLO. CODE REGS. § 207-1: 47.1-1221(5), and "[a] random event has a given set of possible outcomes, each with a given probability of occurrence." § 207-1: 47.1-1224.

[223] HANNUM & CABOT, *supra* note 10, at 237.

[224] Robert Hannum, *Casino Mathematics*, *at* http://gaming.unlv.edu/research/subject/casino_math.html (last visited May 9, 2005).

every dollar bet.[225] In economic terms, regulators attempt to ensure fairness by setting the maximum (and minimum) price a casino can charge players for the gambling experience. Since the price of a casino game is a function of the odds the casino offers to the player, regulatory price controls are a function of controlling the game odds.

## WHAT IS RANDOM?

The concept of random is elusive and its precise meaning has long been debated among experts in probability, statistics and the philosophy of science.[226] A standard dictionary might define random in a general sense as "having no specific pattern or objective; haphazard,"[227] or "made, done, or happening without method or conscious decision."[228] These same dictionaries also might provide a meaning in a more specific statistical sense such as "a phenomenon that does not produce the same outcome or consequences every time it occurs under identical circumstances,"[229] or "an event having a relative frequency of occurrence that approaches a stable limit as the number of observations of the event increases to infinity,"[230] or even "governed by or involving equal chances for each item."[231]

All of these definitions are lacking in some way for purposes of establishing necessary criteria for randomness in games of chance. The implication that random refers to events necessarily governed by equal chances is particularly misleading. Consider, for example, the following simple game. A weighted coin with probability of heads equal to .30 is tossed. A player betting on heads wins a 2:1 payoff if heads occurs. The house will

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[225] *Id.*

[226] *See* DEBORAH J. BENNETT, RANDOMNESS 168-73 (1998) (containing an excellent discussion on the history of attempts to formally define criteria for randomness).

[227] AMERICAN HERITAGE DICTIONARY (2d Coll. ed. 1991).

[228] CONCISE OXFORD DICTIONARY (10th ed. 1999).

[229] WEBSTER'S II NEW COLLEGE DICTIONARY 916 (1995).

[230] *Id.*

[231] WEBSTER'S, *supra* note 229.

in the long run enjoy a 10% edge over the player,[232] an advantage that will hold true assuming heads really occurs 30% of the time and it is not possible to predict on which particular tosses these 30% heads will occur.[233] The "game" is honest, and the events heads and tails can be considered "random" if the outcomes adhere to the prescribed probabilities in an unpredictable way.[234]

Two points are important. First, random does not necessarily mean equally likely (although in situations it does). Second, what really matters with respect to the honesty of a game is that the outcomes conform to the prescribed probabilities in a long sequence—randomness is a function of long-run frequency—and the inability to predict where in a sequence a particular outcome will occur.[235] Although various views exist on the meaning of randomness, few debate that unpredictability is an intuitively desirable trait of a random sequence,[236] and common to all views is the unpredictability of future events based on past events.[237]

This conceptual essence of randomness is contained in

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[232] The player expectation on a 1-unit bet is (0.30)(2) (0.70)(-1) = -0.10.

[233] This is essentially the mathematical definition of randomness set forth by Richard von Mises in his landmark book, *Probability, Statistics and Truth* (2d ed. 1957).

[234] Whether these probabilities are acceptable given the payoffs is an issue of fairness.

[235] Controversy still exists as to whether it is the outcome or the process that should determine randomness, that is, whether randomness is a characteristic of the arrangement itself or the process by which the arrangement was created, or both. One author has said that it is "the nature of a certain ultimate arrangement," and not "the particular way in which it was brought about," that should be considered when judging a random arrangement, and the arrangement must be judged by what would be observed in the long run. JOHN VENN, THE LOGIC OF CHANCE 108 (4th ed. 1962). This expert goes on to say that if the arrangement is too small, we must evaluate the nature of the agent that produced it, and often times the agent must be judged from the events themselves. *Id.* Others contend that randomness is a property, not of an individual sample (or item), but of the process of sampling, and thus nonrandom-looking sequences can be generated by a random process: "random samples are defined entirely in terms of the sampling device." IAN HACKING, LOGIC OF STATISTICAL INFERENCE 123 (1965). *See* BENNETT, *supra* note 226 for further discussion.

[236] VON MISES, *supra* note 233, at 23-29.

[237] *See, e.g.*, BENNETT, *supra* note 226.

definitions found in gaming regulations in numerous jurisdictions. Phrases such as "observed unpredictability" and "absence of pattern" are common.[238] Excerpts from Colorado's requirements regarding randomness of slot machines illustrate:

> "Randomness" means the unpredictability and absence of pattern in the outcome of an event or sequence of events. . . .[239]
> "Events in slot machines and [cashless systems] are occurrences of elements or particular combinations of elements that are available on the particular slot machine [and cashless systems]. A random event has a given set of possible outcomes, each with a given probability on occurrence. The set of these probabilities is called the distribution. Two events are independent if the outcome of one has no influence over the outcome of the other. The outcome of one event cannot affect the distribution of another event if the two events are independent. The random number generator in a slot machine and a [cashless system] must produce game plays that are random and independent . . . .[240]

Although the above-cited regulation explicitly states that game plays must be independent, statistical independence is related to unpredictability and, in a sense, a part of the definition of randomness of games outcomes. Despite this, it is worthwhile to, and many jurisdictions do, specifically address the issue of statistical independence since, technically, random and independent are not equivalent concepts.

In practice, the criteria for randomness and honesty—unpredictability, absence of pattern or regularity, independence, and conforming to prescribed probabilities—are judged in large part using statistical tests. Indeed, a practical definition of randomness is that "a sequence is random by virtue of how many and which statistical tests it satisfies."[241]

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[238] Typical are those in Nevada, Mississippi, and South Dakota. NEV. GAMING COMM'N. REG. 14.010(9); MISS. GAMING COMM'N REG. IV.A(14); S.D. GAMING COMM'N REG. 20:18:17.01(5).

[239] COLO. GAMING COMM'N REGS. § 47.1-1221 (1999).

[240] *Id.* § 47.1-1224.

[241] BENNETT, *supra* note 226, at 169-73; *see also* 2 DONALD E. KNUTH, THE ART OF COMPUTER PROGRAMMING (3d ed. 1998).

### What Does Fair Mean?

While good policy reasons may exist in some jurisdictions to set maximum price, the government may have difficulty in fairly setting standards. The word "fair" is subject to consideration of many factors, many of which are difficult, if not impossible, to define in regulations.[242]

Regulations that set maximum price restrictions tend to be overly general and can present practical problems. For example, regulations can require casinos to pay back at least 80% on slot machines.[243] This type of required payback may or may not be fair to the player, depending on the minimum wager. If an 80% payback applies to a nickel gaming device, the average cost per hour for the player to play this machine with one coin in and 325 pulls per hour is $3.25. This may be fair to the player, but unacceptable to the casino operator if the cost of maintaining a gaming device exceeds $3.25. As a result, the casino may not offer 5-cent slot machines if it is limited to a 20% advantage. In contrast, if the player is playing a dollar machine at a 20% advantage with three coins in, the average price is $195 per hour.[244] This is arguably an unfair advantage over the player.[245]

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[242] A related issue is that of price (and other informational) disclosures in the gambling industry. *See* Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gambling Industry*, 63 Md. L. Rev. 217-86 (2004).

[243] Not an unusual minimum payback percentage. *See supra* note 16.

[244] Concededly, individual players often play for the jackpot, which is substantially higher in a dollar machine. Where players are only gambling for entertainment, pay for that service, and know the cost of playing nickel versus dollar machines, most players would choose the less expensive nickel machines and not play the other gaming devices.

[245] If a jurisdiction wishes to set prices, it must consider the gaming device denomination or table limits in deciding what is fair to both the player and the casino. The result of placing broad maximum price restrictions that apply regardless of denomination or whether the game is a table or gaming device risks being unfair to both the player and casino. Maximum price restrictions may actually increase the price of playing if the casino must eliminate low denomination machines or table games that become unprofitable to offer to players because of such price requirements. This can be partially addressed by having different maximum pricing for different denominations.

Another factor affecting the game price that could be considered in price con-

Regulations relating to honesty attempt to assure that the games produce random results and offer players an equal opportunity to win each prize on any given play and that these results conform to the approved or represented odds of the game being offered. Regulations can range from standards for random number generators in gaming devices to methodologies to test whether table games and gaming devices are performing as mathematically expected.

Fairness refers to the games being designed so that they do not take unreasonable advantage of the player. Slot machines commonly pay back on average 95-96% of all wagers accepted.[246] The 4-5% retained is the casino's profit and pays for its capital costs, operating expenses and a fair profit. Setting the machines to retain 40%, however, may not be reasonable.

In most industries, regulatory price controls mean the government sets prices for services. A state public service commission may set basic telephone rates at $9.00 per month. In the casino industry, the government sets rates by dictating odds of the games. For example, a jurisdiction may require casinos to offer no more than double odds on craps,[247] and their roulette table must both have 0 and 00. These regulations set prices in the casino industry; so do requirements that a casino use multiple decks in blackjack. With slot machines, these standards are usually defined by setting a minimum payout, i.e., prohibiting the casino from theoretically retaining more than a set amount of each dollar wagered. In Nevada, for

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trols is the pace of the game. The government may want to take into account the average number of plays per hour and allow the casino to have a higher theoretical win for the slower games.

Moreover, any regulation on maximum price generally ignores that gaming is no longer homogeneous. The comparable costs to operate a five-star casino resort is considerably higher than a generic four-wall casino. Yet, setting a maximum price will apply equally to both types of establishments. If the maximum price is set too low, it may discourage potential casino operators from investing in the more capital-intense casino/resorts.

[246] This is about average for 25-cent slots in Nevada. Press Release, Tax & License Div., Nevada Gaming Control Bd., Nevada Gaming Revenues Calendar Year 2003 Analysis (Feb. 11, 2004), *available at* http://gaming.nv.gov/documents/pdf/cyrr03.pdf.

[247] *See supra* note 190.

example, all gaming devices must theoretically pay out a mathematically demonstrable percentage of all amounts wagered, which must not be less than 75% for each wager available for play on the device.[248] This means that the maximum average price that the casino operator can charge is $0.25 for each dollar played.[249] Similar maximum price requirements exist in other jurisdictions.[250] Demonstrating compliance with such regulatory controls is largely a mathematical exercise.[251]

Several rationales are argued as the basis for setting maximum price controls.[252] The most relevant for the purpose of advantage play is based on the premise that players generally are incapable of obtaining information about the true price of the casino games and therefore cannot make rational decisions on whether to gamble or to comparison shop.[253] In contrast, casinos that have perfect knowledge of pricing can exploit the player.[254] In most other retail transactions, consumers provide the best protection in assuring the transaction is fair. This occurs because consumers can view the product or services and compare the cost relative to other identical, similar, or substitute products. In these situations consumers have knowledge of price and other market information. In the casino industry, however, consumer knowledge about pricing ranges from sophisticated to oblivious. Moreover, even sophisticated gamblers may have difficulty in appreciating the price of certain bets. In principle, players can determine the price of the game based on its rules and method of play, assuming random results. Even unsophisticated players can buy any myriad of books that ex-

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[248] NEV. GAMING COMM'N. REG. 14.040(1).

[249] Gaming devices that may be affected by player skill must meet this standard when using a method of play that will provide the greatest return to the player over a period of continuous play. *Id.* at 14.040(1)(a).

[250] In Mississippi and Colorado, for example, the minimum payout for gaming devices is 80%. MISS. GAMING COMM'N. REG. IV.E(2); 1 COLO. CODE REGS §. 207-1:47.1-1242(1).

[251] The theoretical payout percentage is determined using standard methods of probability theory. 1 COLO. CODE REGS. § 207-1:47.1-1242(1).

[252] *See* CABOT, *supra* note 7, at 429-32.

[253] *Id.* at 429.

[254] *Id.*

plain both odds and optimum play. For many gaming devices, however, the player is incapable of determining the odds of winning and the frequency of payouts. For example, a video slot machine can have a virtually unlimited number of stops on each reel. The number of such stops is a matter of programming the software that drives the gaming device. A regulatory response to the lack of consumer information about pricing is to set price in an attempt to assure that the games are fair to the player.[255]

## How Law and Regulation Should Address Advantage Play

In dealing with advantage players, the government should consider all policy options in establishing the legal relation-

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[255] Anthony N. Cabot & Robert C. Hannum, *Gaming Regulation and Mathematics: A Marriage of Necessity*, 35 J. MARSHALL L. REV. 333, 341 n.21 (2002). The following quote explains the regulatory response:

> A related consumer information issue has recently surfaced with the increase of gaming devices involving a component of skill. In a game involving skill, the return depends on the player's decisions. When the player [plays badly], the return will be less than when he plays well. Video poker is the classic example [of such a game], but new gaming devices [– particularly those types of slot games previously devoid of skill –] requiring an optimal strategy to obtain the maximum return are being introduced. With these games, [what] kind of information must the game disclose [to] players [so they] may avail themselves of the higher return using an optimal strategy[?] The New Jersey Casino Control Commission has proposed that games of skill provide enough information to enable a player to figure out an optimal strategy. Whether a particular game provides sufficient disclosure under this proposed test is a matter of mathematical proof, available to manufacturers and regulators alike. Typically the only data required for deriving an optimal strategy are the probability of each award occurring and the amount each award pays. In some cases, however, that derivation may involve complicated mathematics. Nonetheless, [New Jersey's approach is] so long as the player has sufficient information to derive an optimal strategy [—even if that derivation requires complicated mathematics—] there is an appropriate degree of fairness. Another suggestion is that skill games be required to have an "autoplay" feature—one that shows the player the optimal choice on any given play.

*Id.*; *see also* Lloyd Levenson & Michael Gross, *Now Playing: Reel Games of Skill*, 22 INT'L GAMING & WAGERING BUS. 7 (2001).

ships between the casino, the advantage player and the state. The highest protection that the government could confer upon the advantage player is to acknowledge the player's right to engage in the particular form of advantage play and prohibit the casino from interfering with such rights. This would place the advantage player in the same position as other protected classes (such as race or creed) or would establish advantage play in the same category as other protected activities (freedom of speech or assembly) for the state has established either constitutional or statutory rights. We will refer to this as a "protected rights." The major option is that the casino can or cannot bar an advantage player from either being in the casino establishment or from playing a particular game.

Besides protected rights, the government needs to define the contractual rights between the advantage player and the state. In other words, should the casino and the advantage player have a dispute over a gaming contract, principally whether the casino can be required to pay alleged winnings to the advantage player, the law needs to define the contractual rights between the advantage player and the casino. We will refer to these as "contractual rights."

## Category One Advantage Play: Using Superior Skill in Analyzing Factors Within the Game Rules that Are Available to All Players

Category one advantage players are the most deserving of legal protection of any advantage players.[256] After all, they are simply using their skills in playing a game offered by a casino consistent with the accepted rules and without any attempt to alter the random events that define the contest or exploit known mistakes by the casino.[257]

With that being conceded, if a category one advantage

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[256] Michael Knoik, *One Step Ahead: Sophisticated Gamblers Use Legal Techniques to Gain Small Advantages at Casino Games* (Spring 1995), *available at* http://www.cigaraficionado.com/cigar/CA_Archives/CA_Show_Article/0,2322,731,00.htm.

[257] *Id.*

player is not entitled to a right to play the casino game of his or her choice, then no other advantage player should have the same right. For several reasons, advantage players should have no legal rights to play the game of their choosing under constitutional, contractual or public policy considerations.

### *Right of Access*

#### Constitutional law

Constitutional law should have no application to advantage play. The law of advantage play has been consistently confused by the consideration of both tort[258] and constitutional laws.

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[258] "A tort is any socially unreasonable conduct, which is not contractual, for which a court will grant monetary damages or an equitable remedy to compensate an individual for his/her injury." Outlaws, Legal Services, *Tort Law* (Feb. 14, 2005), *available at* http://www.outlawslegal.com/refer/torts.htm. Torts generally fall into three categories-intentional torts, which are based on results intended by the wrongdoer; negligent torts, which are unintentional wrongs; and strict liability, which is imposed without fault. *Id.* Intentional torts that have application in relation to advantage players include assault, battery, false imprisonment, defamation, and international or fraudulent misrepresentation. *Id.* "Negligence involves conduct that produces an unreasonable risk of harm." *Id.*

Under traditional common law doctrine, punitive damages cannot be awarded for breach of contract. The Restatement of Contracts 2d, section 355 states that "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981). Damages under contract law are designed only to compensate the wronged party, or to put him in as good a position as if the breach had not occurred, and avoids punishing the breaching party. *Id.* In contrast, punitive damages can be awarded in tort actions where the wrong-doer has committed the act willfully, maliciously, with wanton disregard for the rights of others, or for fraud. *Id.*

This article is generally not concerned with the treatment of advantage players by the casino in expelling them from the casino premises. In no case has a court held that the mere act of excluding an advantage player constitutes an actionable tort. For example, in a 1984 case, a casino that accused a person of being a card counter and escorted her from the blackjack tables was not liable for defamation as card counting is "not a crime, . . . loathsome disease or unshastity." Hoagburg v. Harrah's Marina Hotel Casino, 585 F. Supp 1167, 1170 (D.N.J. 1984). Likewise, casinos are not liable for negligent or fraudulent misrepresentation by failing to inform players that "card counters" may be excluded from playing blackjack. Ziglin v. Players MH, L.P., 36 S.W.3d 786, 790-91 (Mo. Ct. App. 2001). The court reasoned that no negligent misrepresentation occurred because the casino did not fail to disclose information in a particular business

The latter has been particularly misplaced. Constitutional law protections have historically been limited to either protected activities or protected classes of persons.[259] Even if a plaintiff can establish that the conduct complained of is fairly characterized as state action, he must also demonstrate that such conduct deprived the complainant of a right secured by the Constitution or laws of the United States.[260] The types of rights generally protected are those federal rights and liberties such as the right to be free from certain kinds of discrimination, voting, free speech and assembly, equal protection and due process.[261] Violations of the state constitution or of state law is not enough to state a claim for relief under 42 U.S.C. §1983 (or §§ 1985, 1986).[262]

Advantage play involves neither. The U.S. and state constitutions often guarantee certain fundamental rights and protect certain classes of persons from all but the most compelling government regulation. A card counter in blackjack is not a member of a group of citizens that are a "protected class" such that the government should give them a higher degree of protection in certain circumstances. An advantage player is simply someone who wants to be able to take advantage of another party in a private contract. Even the most ardent supporter of

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transaction. *Id.* The court held that this was impossibile because until the casino took a bet from a card counter, there could be no "business transaction." *Id.* The court also held that an affirmative representation would be required to sustain a claim of fraudulent misrepresentation. *Id.* at 791.

Casinos more often complicate their legal liability in dealing with advantage players by confusing cheating and advantage play. Thus, while a casino may act justifiably in detaining a cheater, it may face tort liability for false imprisonment, assault and battery for detaining an advantage player. Bartolo v. Boardwalk Regency Hotel Casino, Inc., 449 A.2d. 1339, 1341 (N.J. Super. Ct. Law Div. 1982); *see also* M & R Inv. Co. v. Mandarino, 748 P.2d. 488, 490 (Nev. 1987). Therefore, the casinos must exercise caution in simply informing the advantage player that they are not welcome to play in the casino or requesting the advantage to leave the casino. *Bartolo*, 449 A.2d at 1341.

[259] *See* Washington v. Davis, 426 U.S. 229, 239-45 (1976).

[260] Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982).

[261] *See generally* Paul v. Davis, 424 U.S. 693 (1976).

[262] Wright v. City of Reno, 533 F. Supp. 58, 63 (D. Nev. 1981); Shutt v. Moore, 613 P.2d 1188, 1190 (Wash. Ct. App. 1980).

the expansion of protected classes would have difficulty making an argument for expansion to include advantage players.

Traditionally, equal protection analysis employs a standard of either strict scrutiny or rational basis. Strict scrutiny is an appropriate standard only where a statute contains a "suspect classification" or limits a "fundamental right."[263] Perhaps the best argument for a federally protected right to play blackjack in a casino is based upon the "equal protection" clause of the Fourteenth Amendment. Once a state initially recognizes and protects ("confers") a certain property right or privilege to its citizenry, the state may not arbitrarily discriminate amongst those who qualify for its benefits.[264] Removal or discrimination of such state-conferred rights as parole, welfare, public education, access to driver's licenses, etc., have been accepted by courts as violative of the equal protections guarantee.[265] Such an argument was stated by Uston in the *Hilton Hotels Corp.* case: that state and federal law confer upon him a protected right of equal access to the Hilton casino, and that these rights are property interests which are protected against arbitrary loss by the Fourteenth Amendment.[266] This alleged property right to casino access could be alleged to be conferred by reason of (1) state and federal public accommodations stat-

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[263] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (travel); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (race); Roe v. Wade, 410 U.S. 113, 115 (1937) (privacy).

[264] *Shapiro*, 394 U.S. at 633, *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

[265] *Id.*

[266] *See supra* note 181 and accompanying text. Note that the question of access to the casino is potentially only a threshold question for the ultimate issue of whether a card counter has a right to engage in gambling at a blackjack table. A distinction can be drawn between a right of access to the casino and a right of access to a specific gambling activity at that casino. This is to say that should a casino decide to exclude a player from the casino, the "right" of equal access is implicated. On the other hand, should the casino merely refuse to deal "21" to a player, but allow him to remain in the casino and, indeed, allow him to partake of a non-blackjack gambling activity, it would seem that the player may have the added burden of proving some federally-or state-conferred right to actually play blackjack (as opposed to a right of entry into the casino).

utes[267] or, (2) a broad federal right of access to places open to the general public. These statutes, however, are typically reserved for the benefit of protected classes. Thus, for example, in *Rosado Maysonet v. Solis*,[268] the Court held that discrimination under Section 2000(a) was not established in respect to the exclusion of patrons from a casino, where at no time was race a consideration in the exclusion.[269] Rather, the court found that the patrons were excluded solely on account of their unruly behavior and their unwillingness to comply with regulations established at the casino for the benefit of all the patrons.[270] The court stated that this statute was directed only at discrimination on the enumerated protected classes.[271]

The substantive due process argument is in all practical matters identical to the test of arbitrary and capricious conduct.[272] The concept of substantive due process and its evolution is an interesting and complex area.[273] The net result of approximately 100 years of evolution is that a challenged governmental act will be upheld unless there is no reasonably conceivable set of facts which could establish a rational basis for the governmental act.[274] To succeed under either test, advantage players must show that the conduct of the regulators was arbitrary and without rational basis.

Challenges presented by advantage players do not contain

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[267] *See, e.g.,* NEV. REV. STAT. 651.070 (2001); 42 U.S.C. § 2000(a) (2004).

[268] 409 F. Supp. 576, 581 (D.P.R. 1975).

[269] *Solis*, 409 F. Supp. at 581.

[270] *Id.*

[271] *Id.* Nevertheless, the "liberal" interpretation which would be urged by a card counter is not without legal support. For example, the California public accommodation law, similar in content to Nevada's, has been specifically held to include and protect from discrimination all arbitrary discrimination by public accommodators, even if the group discriminated against is not one of those enumerated by the statute. *In re* Cox, 474 P.2d 992, 1000 (Cal. 1970). Accordingly, the California court has barred discrimination against homosexuals, against persons with long hair or unconventional dress, and, in the context of expulsion from a race track, against persons with immoral character. *Cox*, 474 P.2d at 1000.

[272] *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 421-55 (1978).

[273] *Id.*

[274] JOHN E. NOWAK, RONALD D. ROTUNDA, & JESSE N. YOUNG, CONSTITUTIONAL LAW 447-48 (1983).

a suspect classification or limit a fundamental right. Therefore, they must be examined under a minimum rationality standard. Under this standard, as explained by the U.S. Supreme Court in *McGowan v. Maryland,*[275] a statute will be found unconstitutional only if the classification rests on grounds "wholly irrelevant" to the achievement of a legitimate state purpose.[276] "There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . . The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'"[277]

*Reasonable Access Rights*

Under the common law, private property owners generally had the absolute rights to exclude someone from their property.[278] Exceptions to this general rule have developed in the common law and by statutory exception. The major exception under the common law was for innkeepers and common carriers for which the public interest required that they not exclude persons unreasonably.[279] As one commentator noted: "The innkeeper is in common calling under severe penalty if he does not serve all that apply, while the ordinary shopkeeper is in a private calling free to refuse to sell if he is so minded."[280] This common law exception was codified in many states in the form of public accommodation laws.[281]

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[275] 366 U.S. 420 (1961).

[276] *McGowan*, 366 U.S. at 425-26.

[277] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S 356, 364 (1972).

[278] *See generally* Perry Z. Binder, Comment, *Arbitrary Exclusions of "Undesirable" Race Track and Casino Patrons: The Courts Illusory Perception of Common Law Public/Private Distinctions*, 32 BUFF. L. REV. 699 (1983).

[279] Bruce Wyman, Note, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 158-59 (1904).

[280] *Id.*

[281] For example, the Delaware Equal Accommodations Law provides:

> (a) No person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on ac-

Advantage players have unsuccessfully attempted to expand the right of reasonable access to the play of casino games. Attempting to ascribe a higher duty to casinos based on a "public calling" similar to innkeepers is misplaced. The whole notion of a duty to serve originated "based on the importance of business to the public"[282] or where no natural or legal monopoly exists.[283] As one commentator noted: "In private businesses, one may sell or not as one pleases, manufacture what quantities one chooses, demand any price that can be gotten, and give any rebates that are advantageous."[284]

The application of the common law right of exclusion has been extended to gambling establishments.[285] For example, in *Brooks v. Chicago Downs Association, Inc.*,[286] the plaintiffs were self-proclaimed expert handicappers.[287] The defendant, a race track, was a privately-licensed corporation, which conducted harness racing in Illinois.[288] Defendant denied plaintiffs entry to all harness events at its race track for no reason other than the plaintiff's skills in handicapping horses.[289]

The race track argued that it should be able to exclude a patron absent any cause at all, as long as it did not violate civil rights statutes precluding discrimination on the basis of race, color, creed, national origin, or sex.[290] The trial court agreed,

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count of race, age, marital status, creed, color, sex, handicap or national origin, any of the accommodations, facilities, advantages or privileges thereof . . . .

DEL CODE ANN. tit. 6, § 4504.

[282] Norman Arterburn, *The Origins and First Test of Public Callings*, 75 U. PA. L. REV. 411, 428 (1927).

[283] Wyman, *supra* note 279, at 156.

[284] *Id.*

[285] *But see* Tyson & Brother-United Theatre Ticket Offices v. Banton, 273 U.S. 418, 440-41 (1927) ("A theater . . . may be regulated so as to preserve the public peace, insure good order, protect public morals, and the like . . . [but] a license is not a franchise which puts the proprietor under the duty of furnishing entertainment to the public or, if furnished, of admitting everyone who applies.").

[286] 791 F.2d 512 (7th Cir. 1986).

[287] *Brooks*, 791 F.2d at 513.

[288] *Id.*

[289] *Id.* at 513-14.

[290] *Id.* at 514.

granted the race track's motion to dismiss, and the Seventh Circuit affirmed.[291] It acknowledged that while the case law states "that a proprietor has the absolute right to exclude, the facts of the case show that just cause existed to exclude the patron."[292] The court concluded:

> [T]hat fact only demonstrates that proprietors of amusement facilities, whose very survival depends on bringing the public into their place of amusement, are reasonable people who usually do not exclude their customers unless they have a reason to do so. What the proprietor of a race track does not want to have to do is *prove* or *explain* that his reason for exclusion is a *just* reason. He doesn't want to be liable to Coley Madden solely because he mistakenly believed he was a mobster. The proprietor wants to be able to keep someone off his private property even if they only *look like* a mobster. As long as the proprietor is not excluding the mobster look-a-like because of his national origin (or because of race, color, creed, or sex), then the common law, and the law of Illinois, allows him to do just that.[293]

Consider the dilemma of a casino if it were prohibited from excluding card counters. Suppose a suspected card cheater was playing. How does the casino exclude him from playing without being subject to a law suit or disciplinary action upon the cheater's claim that he was excluded because he was counting?

As the Arizona Court of Appeals noted:

> We are not persuaded that the common law rule of exclusion should be changed. The policy upon which it is based is still convincing. The race track proprietor must be able to control admission to its facilities without risk of a lawsuit and the necessity of proving that every person excluded would actually engage in some unlawful activity.[294]

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[291] *Id.*

[292] *Id.* at 516.

[293] *Id.* at 517; *see also* Nation v. Apache Greyhound Park, Inc., 579 P.2d 580, 582 (Ariz. 1978).

[294] *Apache Greyhound Park, Inc.*, 579 P.2d at 582.

Certainly the possibility exists that, without regulation to prevent exclusions, lucky players and other non-card counters may be subject to exclusion on the mistaken belief that they are card counters. The free-market economy, however, generally always allowed businesses to make business decisions without having to justify them. For example, if a person with substantial assets requested a secured loan from a bank for $250 and the bank denied the loan, that would be arbitrary. Nevertheless, it does not demand that a law be passed mandating the banker must lend money to that patron. Obviously, the free-market system is not perfect. But as the court recognized in *Chicago Downs Association*, the market is not so imperfect that it requires judicial interference.[295]

> If the decision to regulate were nothing more than a decision that competition was in some way or other inadequate to serve the public interest, and if regulation itself merely *supplemented* such competition as prevailed, there would still be problems of making those decisions but there would be no general regulatory dilemma. The general dilemma arises from the fact that the decision to regulate is, typically, a decision also to restrict competition, not just to supplement it in one way or another, but to *supplant* it. Whether this essentially competitive rather than complementary relationship between these two alter– native systems of social control is inescapable or is the result of bad policy, the fact remains that as it has evolved historically, regulation has consisted largely in the imposition and administration of restrictions on entry and on what might otherwise have been independent and competitive price and output decisions.[296]

One commentator who supports the position that the free market should determine which casinos allow card counters and which do not. He noted that:

> [A]dvertising a no-barring policy might be a good marketing

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[295] Brooks v. Chicago Downs Ass'n, 719 F.2d 512, 518 (7th Cir. 1986).

[296] ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 1 (1971).

> tool for some casinos. It would fit well with high table limits, an image of courtesy and service, etc. On the other hand, casinos that orient their product to the lower end of the market might want to retain the option since a no-barring policy will tend to penalize the very kind of customers [low stakes players] to which they are trying to appeal.[297]

In New Jersey, the *Uston* case appeared to signal a move by that state to expand the right of reasonable access to persons who wished to play a particular game in a particular casino.[298] In *Hoagburg v. Harrah's Marina Hotel Casino*, the federal district court in New Jersey was directly faced with the question of whether the player's right of access overcame the casino's common law rights of exclusion.[299] The court first acknowledged that the majority rule permits "the owner of an entertainment enterprise to exercise an absolute right of exclusion."[300]

New Jersey is, however, among the minority states that have recognized a right of reasonable access that is more encompassing than the innkeeper rule. The right, however, is still based on a notion that, in the absence of an overriding reasoning, the proprietor has a right to exclude. The federal court in *Hoagburg* applied a balancing test to whether the rights of access by a peaceful casino patron were "superior to the casino's right of exclusion even though he was a card counter possessing skills that could reduce the casino's profits."[301] It decided that the casino's right of exclusion was paramount. The court reasoned that the right of access was designed to protect the public's right of free speech. The factors that weighed in the public favor are the nature of the normal use of the private

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[297] CRAIG K. LEHMAN, THE "CONSUMER RIGHTS" OF CARD COUNTERS, THE GAMBLING STUDIES, PROCEEDINGS OF THE SIXTH NATIONAL CONFERENCE ON GAMBLING AND RISK TAKING 127 (1985) (unpublished manuscript on file with the Univesrity of Nevada-Las Vegas).

[298] Uston v. Resorts Int'l Hotel, Inc. 445 A.2d 370, 375-76 (N.J. 1982).

[299] Hoagburg v. Harrah's Marina Hotel Casino, 585 F. Supp. 1167, 1173 (D.N.J. 1984).

[300] *Hoagburg*, 585 F. supp. at 1173.

[301] *Id.*

property, the nature of the public's invitation to use that property and "the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."[302] From the court's perspective, this was a fairly simple analysis. First, the court noted that a "casino is, clearly, not a forum established for the purpose of facilitating the exchange of ideas, but, rather, is a center established for the exchange of money."[303] Second, card counting "is a form of activity having only minimal, if any, expressional objective."[304] Based on these factors, the court refused to recognize a card counter's right of access to the casino.

### *Regulatory Policy*

The policy position urged by card counters is essentially that banning them is inconsistent with the basic public policy that the games be fair. This was alluded to in the New Jersey case involving Ken Uston and is the subject of opinion pieces that have appeared in various media.[305] The fallacy in this argument is that the responsibility of the regulators extends only to assuring that the games are fair in the sense that they are not overly advantageous to the casino such that the player has almost no opportunity to win. Regulation has always recognized the right of the casino to maintain a house advantage to realize a fair profit.[306] As the federal district court noted in the *Doug Grant, Inc.,* case, the

> regulations, which the New Jersey Supreme Court urged the [Casino Control Commission] to adopt in lieu of allowing the casinos to exclude card-counters, balanced the statutory goals of casino viability and fair odds to all players, N.J.S.A. 5:12-100e, and were intended to ensure both the fairness and integrity of casino gambling and "the right of the casinos to

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[302] *Id.* at 1174.
[303] *Id.*
[304] *Id.*
[305] *Resorts Int'l Hotel, Inc.*, 445 A.2d at 373-75.
[306] Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518, 518 (D.N.J. 1998).

have the rules drawn so as to allow some reasonable profit."[307]

From a public policy perspective barring the advantage player may be preferable. The casinos claim if they let card counters play they would have to undertake countermeasures to take away their advantage.

Professor Lehman, Professor of Philosophy at East Carolina University, stated in *The Gambling Studies, Proceedings of The Sixth National Conference on Gambling and Risk Taking* that Ken Uston, who was a well-known card counter, misses the point in his observations that no one would be hurt by a no-barring rule.[308] Professor Lehman discussed some groups overlooked by Uston in his analysis:

> First, there are the less-skilled, poorly-bankrolled, would-be counters like myself—not to mention the one-to-five dollar, simple count players that Uston spends a good deal of time addressing in Million Dollar Blackjack. As Uston so clearly explains and documents, pushing up the cut card to midway in the shoe makes blackjack a much harder game to beat. Counts must be much more powerful (and difficult) in order to pick up useful information: fluctuations in a player's capital become much more violent: the "long run" is further and further off. Small-scale counters are much more likely to be wiped out under such conditions. So if we compensate casinos for the prohibition against barring big-time counters with the opportunity to move the cut card forward, the small-time counters pay for it. And what about single deck, the amateur counter's favorite? Under no-barring conditions, it can't exist at all.
>
> But this is only part of the story. Uston also allows that casinos should be allowed to shuffle up whenever they please as compensation for being forbidden to bar counters. Now consider what this does to the other players. Of course, this practice also damages the small-time counters: but now focus

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[307] *Doug Grant, Inc.*, 3 F. Supp. 2d at 527 (quoting *Resorts Int'l Hotel, Inc.* 445 A.2d at 376).

[308] LEHMAN, *supra* note 297, at 126.

> on just the simple basic-strategy and recreational players. When favorable decks are shuffled away to frustrate the big-time counters, the small fish lose them too. So five-dollar bettors, visiting the casino one weekend a year, lose the blackjack they would have had on the next hand, if not for a shuffle-up, so that a blanket prohibition against barring counters can be maintained. Again the big-time counters are allowed to play at will only at the expense of those who are already the probable losers.[309]

Such observations can be quantified. For example, if the casino moves from a single deck to two decks, the house advantage over patrons that play according to the rules of basic strategy increases by .32%, moving to four decks increases the house advantage by .48%, and moving to six decks increases the house advantage by .54%.[310]

Moreover, allowing the casino to exclude advantage players may itself have good public policy arguments. Casinos would face a dilemma if they were prohibited from excluding card counters. Suppose a suspected card cheater was playing. How does the casino exclude him from playing without being subject to a lawsuit or disciplinary action based on the claim that the cheater was excluded because he was counting?

These arguments are equally applicable to the position that players cannot be excluded from playing progressive slot machines. The assumption for this position is that the public contributed to the progressive jackpot. Therefore, the casino is holding the progressive jackpot "in trust" for the public and cannot remove the jackpot or prohibit a member of the public from playing for it.

This position is not justified by mathematics, contract law or regulatory concerns. Under contract law, the contractual relationship between the patron playing the slot machine and the casino offering the machine ends when the machine determines if the player won or lost and, if he or she won, when the player is paid. This is illustrated in a New Jersey case, where

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[309] *Id.*

[310] HANNUM & CABOT, *supra* note 10, at 134.

the state does not subscribe to the theory that the progressive slots are held in trust for the public.

In *Decker v. Bally's Grand Hotel Casino*[311] a slot player brought an action against a casino after the casino removed progressive slot machines from play before the jackpots were won.[312] The patrons alleged that the removal breached both express and implied contracts. The court disagreed, finding that the "only contract . . . is the obligation of the [casinos] to pay the posted machine jackpot to the plaintiff immediately after the plaintiff has inserted the requisite coinage if the deposit of coinage registers a jackpot on the particular machine then in use."[313] The court failed to recognized "an express and implied contract with the public that the progressive jackpot amount would be awarded to the winning player."[314] Once the contract is complete, i.e., where the player either won or lost, the casino has no other contractual obligations to the player.

Mathematically, the player earns no "vested rights" to the progressive jackpot. Each play of the slot machine is an independent event. The probability of winning on a particular play is no greater if the person had played the machine on the prior pull. Therefore, a player who has "contributed" to the progressive has no greater entitlement or opportunity to the progressive jackpot than someone who has not played the machine.[315]

From both a regulatory and public policy perspective, no justification exists in creating a "vested right" to play the progressive slot machine. This is particularly for slot teams who work to the disadvantage of the slot players who actually played the machines while the jackpots were accruing. By allowing the casino to exclude slot teams, the typical player would not be the subject of the efforts of the slot teams to monopolize the progressive carousels when the jackpots reach a

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[311] 655 A.2d 73 (N.J. Super. Ct. App. Div. 1994).

[312] *Decker*, 655 A.2d at 73.

[313] *Id.* at 76.

[314] *Id.* at 75.

[315] In reality, the player who played and lost the progressive machine, lost the full amount of the wager. The amount of the wager that the casino decides to add to the progressive is in the discretion of the casino.

certain level. It is incongruent to grant slot teams special rights to play progressive carousels on the theory that the progressive jackpot is the property of the public. This operates to the general disadvantage of the very slot players that actually lost the money that was contributed to the jackpot. Moreover, the casino industry receives no positive publicity by having the progressive jackpot won by a slot team.

Moreover, like with card counters, extending the rights to exclude slot teams would eliminate the need for the casinos to implement countermeasures such as reducing the percentage of the patrons' losses that go to fund the progressive jackpots. This counter strategy works to the ultimate disadvantage of the player that wins the progressive jackpot.

### *Contracts Between Advantage Players that Use Superior Skills and Casinos Should Be Enforced Provided that the Contract Was Not Fraudulently Induced*

Within the confines of a gaming contract, the casino promises to pay the patron if certain terms and conditions of the contract are met. Any player that meets such terms and conditions, absent special recognized circumstances, should be entitled to the benefits of the bargain. In the case of a gaming contract, the patron should be paid. A relevant exception to this rule are contracts that are fraudulently induced. The elements of fraudulent inducement are: (1) material misrepresentation made by a party and known to be false; (2) with the intent to cause inducement/reliance; (3) actual inducement causing another party to enter an agreement; (4) justifiable reliance on the misrepresentation; and (5) resulting damages proximately caused by the reliance.[316]

In the context of advantage play, fraudulent inducement could occur where the person intentionally misrepresents either

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[316] *See, e.g.*, Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999); *see also* Suffield Dev. Assocs. Ltd. P'ship v. Nat'l Loan Investors, L.P., 802 A.2d 44, 51 (Conn. 2002); Blumenstock v. Gibson, 811 A.2d 1029, 1034 (Pa. Super. Ct. 2002); Sumitomo Bank of Cal. v. Taurus Developers, Inc., 185 Cal. App. 3d 211, 222 (Cal. Dist. App. 1986).

his identity or his skill level to induce the casino to enter into a gaming contract. For a casino to be successful in avoiding a contract based on fraudulent inducement, it must meet and prove all the elements of the fraudulent inducement by clear and convincing evidence.[317] Practical obstacles facing the casino are that the person made a material misrepresentation and that the casino relied on it in allowing the person to play.

Rarely do casinos require that a person provide positive identification before allowing them to play in a casino. Where a casino does require identification, it is most likely required for a reason unrelated to ascertaining whether the person is an advantage player. For example, the casino may need to ascertain the person's age because minors are prohibited from gambling or for purposes of filing cash transaction reports mandated by anti-money laundering laws.[318] Where the casino requests identification from the player for a different reason than assessing whether he or she is an advantage player, the use of false identification by the player would not be detrimentally relied on to allow the player to play any given game.

For example, in *Chen v. Nevada State Gaming Control Board*,[319] a card counter entered a Nevada casino and exchanged about $30,000 in cash for casino chips. The casino requested identification and the player produced a fictitious

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[317] Rhode Island Hosp. Trust Nat'l Bank v. Howard Communications Corp., 980 F.2d 823 (1st Cir. 1992). The court in *Howard Communications Corp.* stated:

> Finally, we perceive no error in the district court ruling rejecting appellants' claim that their loan guaranty was fraudulently induced by Hospital Trust. Where, as here, a claim must be established by "*clear* and *convincing evidence*," . . . "evidence that is 'merely colorable or is not significantly probative' cannot deter summary judgment.

*Howard Communications Corp.*, 980 F.2d at 828 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249-50 (1986)) (citations omitted). Pinken v. Frank, 704 F.2d 1019, 1024 (8th Cir. 1983) ("As in any fraud case, the defrauded party must prove his *fraudulent inducement* defense by *clear* and *convincing evidence* in order to defeat the written contract.").

[318] Andrew N.S. Glazer, *Technology Thwarts Sneaky Gamblers*, DETROIT FREE PRESS, Nov. 3, 2000, *available at* http://www.freep.com/news/casinos/game3_20001103.htm.

[319] 994 P.2d 1151 (Nev. 2000).

passport.[320] The player won about $85,000 and attempted to cash the chips. The casino refused after again requesting identification and then realizing it was false.[321] The Nevada Supreme Court reviewed this as a fraudulent misrepresentation claim. Although not specifically stated, the case was a fraud in the inducement of a contractual relationship. The court held in favor of the player because there was no evidence that the casino "detrimentally relied on [the player's] false passport when it allowed him to play blackjack."[322] This was a supportable proposition as federal and state law requires the casino to obtain identification when accepting more than $10,000 in cash in exchange for playing chips.[323] The second basis for ruling for the player, however, is quite debatable. The court held that the player's "skill in playing blackjack, rather than his misrepresentations of identity, was the proximate cause of his winnings."[324]

### *Countermeasures Should Be Made Part of the Explicit Terms of the Gaming Contract*

Casinos should have the right to incorporate countermeasures to advantage play provided that the countermeasures are made part of the express terms of the contract with the player. Any person to a contract has the ability to define those terms under which he or she is willing to enter into that contract. Except for some limited overriding policy concerns unique to gambling contracts, the casino should be able to set the terms on which it is willing to accept a wager. Inherent in those terms are the ability to incorporate countermeasures that effectively reduce or eliminate the advantage sought by advantage players. These countermeasures, however, should be express terms of the contract, particularly where the countermeasures are contrary to the traditional methods of playing the games.

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[320] *Chen*, 994 P.2d at 1152.
[321] *Id.*
[322] *Id.*
[323] *Id.*
[324] *Id.*

Casinos, however, should be prohibited from using countermeasures, such as preferential shuffling, that are based on using superior skill in analyzing the game factors that are not available to players. Under contract law, this would be permitted provided that the right of the casino to use preferential shuffling was made a part of the contract between the patron and the casino. While the casinos should generally be permitted to set the terms and conditions of the gaming contracts that they are willing to accept, the overriding principles of gaming regulation are that the games offered are fair and honest. Based on established rules of play of the various table games, the players have all the information available to them to determine the house advantage in a given game. To allow the casino to use superior technology or skill to determine when to implement countermeasures may be, in some circumstances, a rare exception where public policy, through the implementation of gaming regulations, should override contract law. One such circumstance is where a casino may implement smart tables that could track by computer the cards played in blackjack and calculate when the deck favors the player. Based on this information, the casino could then initiate a preferential shuffle.

Allowing a casino to use superior technology, particularly where the player is prohibited from using a computer to assist in his play, can raise fundamental issues regarding the honesty and fairness of the games themselves sufficient to justify regulatory intervention. The games offered in casinos do not necessarily have static odds. For example, in blackjack, the player's expectation of winning will change as certain cards are played in the shoe. However, the use of computers by the casino to track the odds and initiate a shuffle gives the casino the ability to control the odds. This would be equally applicable where the casino trains dealers to card count and instructs the dealers to initiate the shuffle when the deck favors the player.

The use of such technology to identify advantage players alone may fall outside such regulatory concerns. For example, if the casino uses a fixed cut card and authorizes preferential shuffling, the use of such technologies to simply identify a card counter only impacts the card counter and not the fundamental

odds of the game itself.

### *Advantage Play that Involves Using Superior Skill Should Not Be Illegal*

Advantage play that involves using superior skill in analyzing the game factors that are available to all players should never be illegal. Where gambling involves part skill, such as the games of poker and blackjack, the exercise of that skill is part of the basic contractual understanding of the parties. If one party believes that the other has too significant of an advantage based on skill or the basic house advantage, then that person has the option not to enter the contract with the other party. Once the parties enter into a contract, however, the exercise of skill by the participants consistent with the rules of the game are expected, proper and should never be considered unethical or unlawful.

## Category Two Advantage Play: Using Superior Skill in Analyzing Factors Outside the Game Rules that Are Available to All Players

### *Contractual Enforcement*

The covenant of good faith and fair dealing that is implied in all contracts requires that neither party to a contract do anything that will injure the right of the other party to receive the benefits of their agreement. Category two advantage play tests the extent to which this covenant applies to a gaming transaction because it involves information that is intentionally exposed and available to all players. On one hand, a player is using this information in an attempt to make predictions as to the result of what otherwise should be a random event that determines the outcome of the contract. On the other hand, a player is only using his or her cognitive ability to process information that the casino intentionally provides, and that can be used relevant to shuffling procedures that the casino intentionally employs and does not involve taking advantage of any mistakes by the dealers of the game. While an argument can be made that the use of this information would tend to defeat the

right of the casino to receive the benefit of their bargain, the casino impacts such rights by choosing the procedural methods of play.

The use of computers to process the data from the discards and the shuffling procedures, however, presents a much different case. Casinos should not be expected to assume that shuffling procedures that cannot be simple cognitive abilities must be protected from the manipulation of sophisticated computer technologies. Here, the covenant should have application. Moreover, this situation provides support for the general prohibition against the use on the casino floor of computers to analyze data for the purpose of predicting probabilities.

Computers can provide a player with a tool that often exceeds that player's own cognitive ability to analyze probabilities in a game. As a result, some states, like Nevada, have criminalized the use of computers in the casino. The Nevada statute provides that, except as permitted by the Nevada Gaming Commission, a person may not use, or possess with intent to use, any device to help in:

- projecting the outcome of the game;
- keeping track of the cards played;
- analyzing the probability of the occurrence of an event relating to the game; or
- analyzing betting or playing strategy.[325]

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[325] NEV. REV. STAT. 465.075 (2001). A patron argued that the statute was vague on what type of conduct it prohibits. Childs v. State, 864 P.2d 277, 278 (Nev. 1993). The Nevada Supreme Court restated the standard for evaluating vagueness. The test is whether a person of ordinary intelligence has a reasonable opportunity to know what conduct is prohibited. *Childs*, 864 P.2d at 278. The court found that the statute was not vague as applied to the patron because the use of a hidden computer is precisely the type of conduct envisioned by the statute. In finding that no person of ordinary intelligence could believe otherwise, the court stated that whatever else the term "device" (listed in NEV. REV. STAT. 465.075) meant, it included computers. *Id.* The statute allows the Commission to permit the use of certain devices. The Commission passed a regulation allowing baccarat and roulette players to make and refer to cards played at baccarat, or the numbers chosen at roulette. NEV. GAMING COMM'N REG. 5.150(1). Additionally, the Board Chairman may approve the use of other devices upon written request of a casino. *Id.* at 5150(2).

*Legality*

The major reason that governments decide that certain casino-related activities should be criminal violations is that they involve morally-reprehensible conduct that is deserving of criminal penalties, including jail time. Casino crimes generally fall into one of three broad categories. The first category is skimming and cheating by owners. Skimming is the taking of money from the drop before it is counted for tax purposes. Skimming is called tax evasion in other industries. Casino owners may steal from patrons by rigging the games to ensure that the patron loses. The second category of gaming crimes is employee theft. Unscrupulous employees may steal from both their employers and casino patrons. The third category of casino crimes is theft by third parties against a casino or its patrons.

Each variation of the cheating is simply a form of theft. Most gaming jurisdictions, however, separately define cheating as a crime and typically have a myriad of more specific statutes that cover the different forms of cheating. The reason for this is that almost every successful challenge to criminal laws that prohibit cheating at licensed games are based on the defense that the law was too vague. A statute is too vague if it did not place the defendant on fair notice that his actions were criminally actionable. The requirement that criminal statutes define offenses with extreme particularity is unrealistic.[326] Yet, an overly broad statute will fall to a vagueness challenge. If criminal statutes are to define each crime with extreme particularity, one of two things may happen: (1) the number of such statutes would be voluminous so as to cover all possible crimes; or (2) if a crime is not specifically precluded by statute, a person in violation could not be punished. Therefore, a balance between specificity and broadness is beneficial with more weight towards specificity.

The Due Process Clauses of the Fifth and Fourteenth Amendments require definiteness.[327] Definition is of major

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[326] Grayned v. City of Rockford, 408 U.S. 104, 109-12 (1972).

[327] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW

importance in criminal law due to the underlying premise, flowing from due process, that the public must be placed on notice as to what conduct is criminal.[328] The public has only fair notice of a criminal offense if the law proscribing such conduct does so with sufficient clarity that an individual of ordinary intelligence would not have to guess at its meaning.[329] To place an individual on fair notice, this higher degree of specificity is necessary.

Criminal statutes pertaining to gaming are illustrative of the need for specificity.[330] Despite the specificity of many casino crimes, the underlying basis for the criminal prohibitions is that the various forms of casino cheating are simply forms of the underlying crime of theft.

While shuffle tracking without the aid of a computer may involve the intent to defeat the random event that determines in part the outcome of the event, how do you define a crime with specificity based on the use of one's mind to process readily-available information? Can it be illegal to use your mind to process readily-available information?

Moreover, what is the actus reus that forms the basis for the offense? Unlike typical forms of casino cheating, there is no overt act that separates what would be a legal act from an illegal act. No overt manipulation of the gaming apparatus occurs whether it be the marking of cards or the sliding of dice. Moreover, the player does not use devices or physical positioning to learn information, such as the dealer's hole card, that is not otherwise available to all players.

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§ 1.2(b), at 10 (1986).

[328] *Id.*

[329] United States v. Harris, 347 U.S. 612, 617 (1954).

[330] As previously stated, even though an attempt was made to increase the probabilities of a win by manipulating the handle of a slot machine, the court ruled that "popping" the handle was not illegal. Lyons v. State, 775 P.2d 219, 222 (Nev. 1989), *overruled in part by* City of Las Vegas v. Eighth Judicial Dist. Court, 59 P.3d 477 (Nev. 2002). The court reasoned that the criminal statute referred to the mechanical alteration of a slot machine and that handle "popping" did not mechanically alter the slot machines. *Lyons*, 775 P.2d at 222.

## CATEGORY THREE ADVANTAGE PLAY: TAKING ADVANTAGE OF THE CASINO'S MISTAKES

### *Contractual Enforcement*

Some advantage players go to casinos looking for errors and then obtain jackpots or awards based on these mistakes. Little difference exists between these advantage players and persons who go to the grocery store and purchase a gallon of milk knowingly mislabeled for a fraction of its actual cost. If discovered, the person buying the milk would not be able to take advantage of the grocery store's mistake; the customer would have to pay the full price. Just as a grocery store would be able to defend upon a unilateral mistake, the defense would similarly apply to a casino hit by the advantage player.

Simple ethical considerations, however, that would apply in everyday life seem to take on a different life in the casino environment. Can one seriously argue that it is ethically acceptable to take advantage of a patently mispriced product at a grocery store?[331] How about keeping an overpayment on an insurance claim or an ATM withdrawal?

Yet, even courts seem to have difficultly in finding that simple unethical behavior when practiced against a casino is unethical. The distinction, however, is probably based more on the perceived notion of the casino as the exploiter.[332] Therefore, taking advantage of the exploiter is not socially reprehensible.

This notion is misplaced. The house advantage maintained by the casino is necessary to assure the economic viability of the casino, but is regulated by the government to assure that it is fair to the player.[333] This is no different than the mark-up

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[331] RANDY COHEN, THE GOOD, THE BAD AND THE DIFFERENCE: HOW TO TELL RIGHT FROM WRONG IN EVERYDAY SITUATIONS 39 (2002).

[332] *See, e.g.*, James C. Dobson, Ph.D, *Gambling Has Permeated Every Corner of Society and Is Inflicting Great Harm on Families, Individuals and, Especially, on Children*, HOTEL ONLINE SPECIAL REPORT, *at* http://www.hotel-online.com/Neo/News/PressReleases1999_1st/Mar99_GamblingDobbs.html (last visited May 9, 2005).

[333] Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518, 527

that a grocer may charge on a gallon of milk. The house advantage is simply a reflection of the price that a player pays for the opportunity to play the game.[334] If the player believes that the casino is being unfair and charging too much, the player is no more compelled to play at the casino, than he is to buy a gallon of milk that he believes is overpriced.

In the gaming context, cases involving an advantage player who knowingly or intentionally takes advantage of a casino's error should trigger the unilateral mistake defense. A casino offers games or play to its patrons, which are regulated so as to be conducted fairly and honestly under certain rules and regulations, odds and payout guidelines.[335] When the casino customer places a wager on a game or puts money into a gaming device, both the customer and the casino enter into a contract on the basic assumption that the patron will be awarded if a winning result from the game or machine operated accordingly is achieved.[336]

Advantage play in which the player takes advantage of the casino's mistakes in posting the term of the amount of the jackpot payout should not be enforced if the casino can prove that the player knew of the mistake, and the difference between the posted payout and the intended payout would be unconscionable. This would be no different than allowing one person to knowingly take advantage of the other person's mistake in any other contractual context. If the other party is aware of or should have been aware of the mistake, the contract may not be enforceable, even if the enlightened party, in this case the advantage player, did not cause the mistake.

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(D.N.J. 1998).

[334] CABOT, *supra* note 7, at 419-24.

[335] HANNUM & CABOT, *supra* note 10, at 237-44.

[336] For example, if a customer puts a quarter in a slot machine that lists three sevens on the payline as a winning combination, once the quarter is inserted into the machine, both the casino and the patron agree that the patron will be paid if the machine hits three sevens. However, if the three sevens appear below the payline, the casino patron could not claim a jackpot because the displayed casino rules require the three sevens to be on the payline and the customer had accepted those terms when he or she put the quarter into the slot machine.

As demonstrated, a casino should be able to assert the defense of unilateral mistake in cases of advantage play. "A unilateral mistake occurs when one party recognizes the true effect of an agreement while the other [party] does not."[337] The Restatement (Second) of Contracts sets out the basic rules for when a unilateral mistake by one party makes a contract voidable. It provides:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
> (b) the other party had reason to know of the mistake or his fault caused the mistake.[338]

Therefore the casino must satisfy four requirements before it can avoid the contract on account of a unilateral mistake.

*Payouts Are a Basic Assumption of the Contract*

A casino's mistake with a game or gaming device is upon a basic assumption on which the casino made the contract. The purpose of a gaming contract is for one party to win a defined amount of money and the other party to lose a defined amount of money with the stakes and payouts being defined by the agreed terms of the contract and the result being determined in whole or part by a random event.

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[337] General Tire, Inc. v. Mehlfeldt, 691 N.E.2d 1132, 1136 (Ohio Ct. App. 1997).

[338] RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981); *see* Aviation Sales, Inc., v. Select Mobile Homes, 548 N.E.2d 307, 310-11 (Ohio Ct. App. 1988); Nematollahi v. United States, 38 Fed. Cl. 224, 234 (1997).

*Mistaken Payouts that Result in a Player's Advantage Are Material*

The type of mistakes typically sought by the advantage player are of the type that are materially adverse to the casino's performance on the agreed exchange of money with an advantage player that is determined in whole or part by a random event. As one court noted, "A significant error in the price term of a contract constitutes a mistake regarding a basic assumption upon which the contract is made, and such a mistake ordinarily has a material effect adverse to the mistaken party."[339] In the casino environment, the price term is determined in part on the amount of the payout.[340] Courts frequently define a material mistake as one which results in an unconscionable contract,[341] or one in "which no man in his senses, not under delusion, would make, . . . and which no fair and honest man would accept . . . ."[342] This may be restated in economic terms. If the party making the mistake is in the business of making a profit, an unconscionable mistake would be one that results in a loss as opposed to a diminished profit. This goes to the very heart of what the advantage player is attempting to accomplish by taking advantage of the casino's mistake, i.e., to find those situations where the casino will sustain a loss to the advantage of the advantage players.

*A Casino Rarely Would Bear the Risk of Mistake for Advantage Play*

The Second Restatement addresses this issue of who "bears the risk," in § 154, which provides that a party bears the risk of mistake when:

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[339] Donovan v. RRL Corp., 27 P.3d 702, 716-17 (Cal. 2001), (stating that an error amounting to thirty-two percent in sales price of an automobile is material).

[340] Other factors in the pricing of the casino wager include the amount of the wager, the odds of obtaining a winning payout, and the skill level of the player in those games where skill plays a factor.

[341] *See, e.g.,* Alaska Int'l Constr., Inc. v. Earth Movers of Fairbanks, Inc., 697 P.2d 626, 629-31 (Alaska 1985).

[342] Smith v. Mitsubishi Motors Credit of Am., Inc., 721 A.2d 1187, 1190 (Conn. 1998) (internal quotations omitted).

> (a) the risk is allocated to him by agreement of the parties, or
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.[343]

In the case of advantage play, the agreement of the parties does not allocate the risk. For example, no term of the agreement, implied or express, provides that the casino bears the burden of mistakes in posting jackpots. Likewise, mistakes where the casino acts with limited knowledge as to the facts would be rare, but could occur. These would, however, be predicated on the casino being made aware of the terms of the agreement, including the amount of the payout but assuming the contract obligations, without adequate investigation of the consequences. For example, if a player proposed to the casino that he would agree to play 100 hands of baccarat at the casino for $10,000 per hand if the casino agreed to waive the commission on house bets, the modification of this term alone would change the odds of the game from a slight house advantage to a slight player advantage if the player only bet the house hand.[344] If the casino accepted the condition without investigating the math associated with accepting the challenge, then the potential exists that a court may conclude that the casino treated its limited knowledge as sufficient to enter the contract. This situation is inapposite to the typical advantage play situation where the mistaken posting of the jackpot amounts based on the equivalent of clerical errors in placing the wrong signs on a gaming device.

The final situation where the casino may bear the risk of mistake is where risk is allocated to the casino on the ground that it is reasonable under the circumstances to do so. A casino is typically the unsympathetic party to the contract. For exam-

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[343] RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981).
[344] BRISMAN, *supra* note 108, at 146.

ple, in another context, the Nevada Supreme Court reasoned that "card players may exploit a dealer's unintended revelation of his cards" (hole carding) because they are doing nothing more than taking advantage of what the casino gives them.[345] In other words, the risk of mistakes should fall on the casino.

While some courts have refused to rescind contracts when the mistake resulted from the affected parties' negligence or lack of due care,[346] the prevailing standard is that risk should be allocated to the casino only if the mistake resulted from negligence of a legal duty, not from ordinary negligence.[347] The Restatement would impose liability on the party making the mistake if it failed "to act in good faith and in accordance with reasonable standards of fair dealing."[348]

*By Seeking Out Casino Mistakes, Advantage Players Have Reason to Know of the Mistake*

The advantage player operates by seeking out and discovering the mistakes of casinos and obtaining greater winnings as a result. Accordingly, the advantage player has "reason to know of the [casino's] mistake" and exploits it to his or her benefit.

The Restatement uses the language "reason to know" to communicate that the actor "has a duty to another" and "he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know."[349]

Both activities involve actions that relieve the casino from

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[345] Lyons v. State, 775 P. 2d 219, 222 (Nev. 1999), *overruled in part by* City of Las Vegas v. Eighth Judicial Dist. Court, 59 P.3d 477 (Nev. 2002).

[346] *See* Fleming Cos., Inc. v. Thriftway Medford Lakes, Inc., 913 F. Supp. 837, 843-44 (D. N.J. 1995). Even in this context, however, the mistake must be more than simply clerical. To be excusable, the mistake result from clerical, mechanical or technical errors. Nationwide Mut. Ins. Co. v. Voland, 653 A.2d 484, 489 n.9 (Md. Ct. Spec. App. 1995).

[347] *Donovan*, 27 P.3d at 717.

[348] RESTATEMENT (SECOND) OF CONTRACTS § 157 (1981).

[349] RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981); *see* Ostman v. St. John's Episcopal Hosp., 918 F. Supp. 635, 646 (E.D.N.Y. 1996).

having to pay the wager. A casino, however, may have difficulty in many situations to prove that the advantage player knew or had reason to know of the mistake because the burden of proving a unilateral mistake is on the casino seeking rescission and must be met by clear and convincing evidence.[350] Therefore, the casino must prove, typically by circumstantial evidence, that the player entered the casino with the intent of finding a game or device containing a mistake in posting a payout. Where the advantage players work in teams and the team involves persons with no prior advantage play history, meeting this burden of proof may be difficult.

### *Legality*

Taking advantage of a casino's mistakes in posting payouts could constitute the criminal offense of larceny. One federal court explains this principle in the following passage:

> It has long been recognized, however, that when the transferor acts under a unilateral mistake of fact, his delivery of a chattel may be ineffective to transfer title or his right of possession. If the transferee, knowing of the transferor's mistake, receives the goods with the intention of appropriating them, his receipt and removal of them is a trespass and his offense is larceny.[351]

Larceny requires an intent to steal the property of the casino. This stealing is depriving the owner of the permanent possession of his property.[352]

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[350] *See, e.g.,* Jensen v. Miller, 570 P.2d 375, 377 n.1 (Or. 1977).

[351] United States v. Rogers, 289 F.2d 433, 438 (4th Cir. 1961) ("[I]t appears to have become settled in England that . . . if the recipient knows at the time he is receiving more than his due and intends to convert it to his own use, he is guilty of larceny.").

[352] *See, e.g.,* MODEL PENAL CODE § 223.0(1). Larceny by mistake is often codified by state statute. For example, New Jersey law provides:

> A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, knowing the identity of the owner and with purpose to deprive said owner thereof, he converts the property to his own use.

Larceny by mistake more typically occurs in the context of a clerical mistake in payment of amounts on checks,[353] but has also been found in other contexts where the party took economic advantage of mistakes. For example, in one case, a bank mistakenly gave unlimited overdraft protection to the defendant, who, in turn, issued 213 checks in the total amount of almost $850,000. This resulted in a conviction for theft, although one Justice in dissent noted that the bank's "negligence, and not defendant's criminality, was culpable."[354]

The notion that the advantage player may take advantage of whatever the casino gives him is, likewise, devoid of support in the criminal context. As one court noted:

> It might be argued that he got the property rightfully, not having practiced any fraud or trickery in order to obtain it, but . . . the deed of this man amounted to fraud, and he should not escape punishment on the tenuous ground that because the excess payment was made without positive action on his part and while he stood silent he was not guilty of larceny.[355]

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N.J. STAT. ANN. § 2C:20-6 (1939). Likewise, Pennsylvania law provides:

> A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with intent to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

18 PA. CONS. STAT. ANN. § 3924 (1930).

[353] State v. Hector, 402 A.2d 595, 596-97 (R.I. 1978) (noting defendant was guilty of criminal larceny by accepting $8,051.69 after a bank clerk made the mistake and misread a check for $851.69).

[354] State v. Langford, 483 So. 2d 979, 986 (La. 1986) (Watson, J., dissenting).

[355] Sapp v. State, 26 So. 2d 649 (Fla. 1946) (en banc) (noting defendant accepted $4,328.37 when cashing a check for $36).

## Category Four Advantage Play: Acquiring Knowledge Not Available to Other Players that Provides an Advantage in Determining or Predicting What Was Intended to Be a Random Event

### *Contractual Enforcement*

All contracts include an implied covenant of good faith and fair dealing.[356] This covenant should be involved whenever an advantage player decides that he or she will deliberately attempt to acquire knowledge not typically or readily available to other players that provides an advantage in determining or predicting what was intended to be a random event. After all, the basic foundation of the contract itself is that the winner and loser will be determined by a random event. In this case, the player is attempting to learn, in advance, in part or whole, the random event. The covenant requires that neither party to a contract do anything that will injure the right of the other party to receive the benefits of their agreement.

The probability of winning or losing at a certain casino game is predefined and that information is readily obtainable to anyone who wants to know.[357] On one hand, cheating would obviously violate the covenant. For example, it does not take a skilled mathematician to determine that the odds of rolling a seven in craps is 1 out of 6. Therefore, it follows that if either party to the gaming contract tried to change these odds through advantage play, e.g., the patron used loaded dice or engaged in "dice sliding," that party would be injuring the right of the other party to receive the benefits of their agreement. Likewise, acquiring knowledge not typically or readily available to other players that provides an advantage in determining or predicting what was intended to be a random event has the same practical and mathematical effect. Both involve the patron using deliberate methods to alter the outcome of the

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[356] 17A C.J.S. *Contracts* § 346 (1999).

[357] A quick search on Amazon.com for "gambling books" reveals thousands of books on the subject; most of these books offer to explain the odds of the game.

contract by either altering the random event or learning information upon which the result is based to gain an advantage over the casino. Thus, by attempting to change the odds or learn of the results of a random event occurring or not occurring, advantage play would violate the implied covenant of good faith and fair dealing.

*Legality*

As scienter or fraudulent intent is an element of cheating,[358] should the law criminalize activity where the player simply acts upon information exposed where he or she did not enter the casino with intent to fraudulently obtain and act on this information? The latter is the case where a typical player sitting at the table learns of the value of the dealer's hole card because the dealer makes an error in exposing the card.

Hole-carding professionals and teams are much different than where a player, without fraudulent intent, learns the dealer's hole card because of "a dealer's unintended revelation of his cards."[359] Here, cheaters play the game with the intent of learning the dealer's hole card by undertaking some act to either learn the hole card where the dealer is properly protecting it or by using the hold card techniques that accentuate poor dealing. Note, for example, this quote from an interview with a hole carder:

> Another cute ruse, I used a few times in the '80s, is posing as a wheelchair-ridden muscular-dystrophy victim during the week of the Jerry Lewis telethon. I'd roll up to the table, eyes level with the felt. Using spasmodic movements and twisted posture I announce in a strained voice that I was the 1964 Jerry Lewis Muscular Dystrophy "poster boy." Of course the primary reason for the act was to have my eyes level with the felt to be able to see the dealer's hole card flashing with each round.[360]

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[358] Sheriff of Washoe County v. Martin, 662 P.2d 634, 638 (Nev. 1983).

[359] *Id.*

[360] Barfarkel, *The Zengrifter Interview*, *at* http://www.cardcounter.com/interview_Zen_Grifter.htm (last visited May 4, 2005).

Therefore, attempting to acquire knowledge not typically or readily available to other players that provides an advantage in determining or predicting what was intended to be a random event should be illegal and unenforceable if the player uses any artificial or deliberate means to gain the advantage such as mirrors or spotters.

An argument can be made that a typical player that learns of the dealer's hole card because of a dealer's error is no less of a thief than a person who cashes a $100 check and knowingly keeps the extra $900 when the bank clerk mistakes it for $1000. In theory, the player that uses such information forms a fraudulent intent when he or she uses the information to gain the advantage created by the mistake. Moreover, using a person's mistake to that person or his or her employer's disadvantage is unethical.

### CATEGORY FIVE ADVANTAGE PLAY: ALTERING THE RANDOM EVENT TO THE PLAYER'S FAVOR.

#### *Contractual Enforcement and Legality*

Advantage play where the player alters the random event to the player's favor should always be illegal and unenforceable.

This argument is consistent with the basic premise of contract law as it applies to casino games. In the typical casino game, both the player and the casino base the ultimate decision as to who wins or loses on the random event. Where skill is involved, the contract allows the player to exercise his skills consistent with the terms and conditions of the contract. A person who engages in handle slapping is fraudulently attempting to alter the basic premise of the contract, i.e., to remove the random element upon which the very outcome of the contract is based.

In another Nevada case[361] that involved handle popping,

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[361] Childs v. State, 864 P.2d 277 (Nev. 1993). Another Nevada case illustrates some of the extreme measures used by patrons to cheat the casinos. State v.

the dissent noted that:

> Slot machines are designed . . . to be played in a manner in which the reels are allowed to spin freely and then be stopped by a timing device in *random* fashion. When a player intentionally interferes with this randomness, such a player is clearly manipulating the machine "in a manner contrary to the designed and normal operational purpose' of a slot machine."[362]

The dissent properly concluded that "[a]nyone who plays a game of chance, a game based on random selection, who *knows* that he cannot lose, and cannot, in fact, lose, can probably be safely called a cheater."[363]

Of course, attempting to reconcile the *Skipper* case, which held that dice sliding is illegal, with these earlier handle popping cases is not possible. Using the same logic, the court would have to conclude that the rules of slot play do not necessarily require that the symbols on the payline of the slot machine do not have to randomly appear but can be manipulated by one of the parties. Fortunately, the handle popping decisions became moot, not by subsequent legislation, but by technological advancements that made handle popping impossible on the newer generations of slot machines.

The correct legal proposition is "[w]hen a person . . . inten-

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Anderson, 746 P.2d 643, 643 (Nev. 1987). A surveillance camera noticed that the patron moved his toes often while playing blackjack. His toe movements corresponded to the appearance of certain cards on the table. After casino security officials confronted him, the patron, a computer expert, admitted that he had hidden a microcomputer in his shoe. To pull off his "computer shoe" scam, the patron cut his socks to allow his bare toes to input data into the computer. Velcro held the switches in his shoes. Wires extended up his legs to a battery pack located in his left rear pocket. He strapped the main portion of his computer to his left calf, and the computer sent vibratory signals to a special receiver located inside his athletic supporter. The signal told him whether to hit, stand, double down, or split. The computer calculated his advantage or disadvantage with the casino, and advised him of the remaining cards in the deck. The police arrested the patron, and charged him with having and using a device at a casino to keep track of cards played. *Anderson*, 746 P.2d at 643.

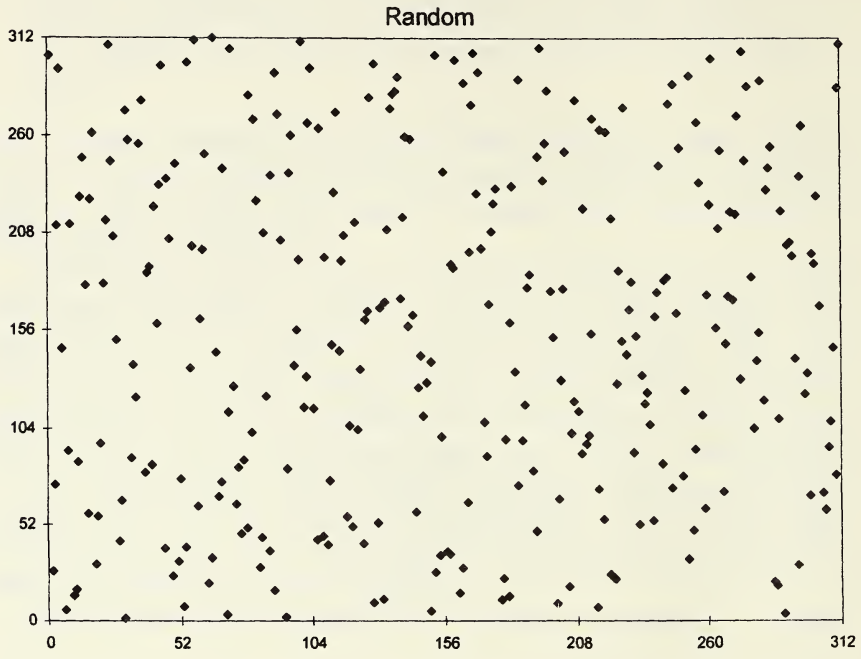
[362] *Childs*, 864 P.2d at 280 (Springer, J., dissenting) (emphasis added).

[363] *Id.* at 281 (Springer, J., dissenting) (emphasis added).

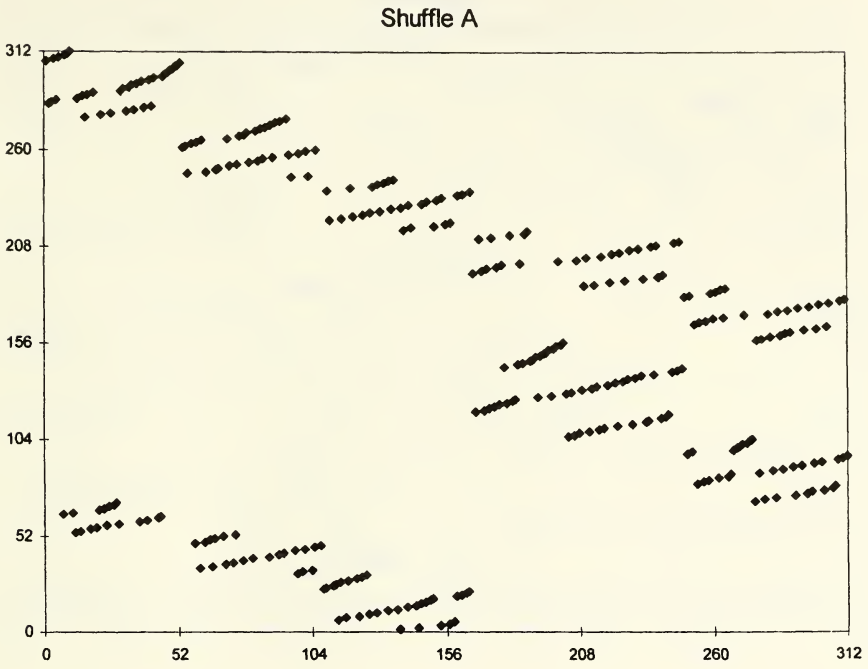
tionally impedes or destroys [a game's] randomness, that person is cheating."[364]

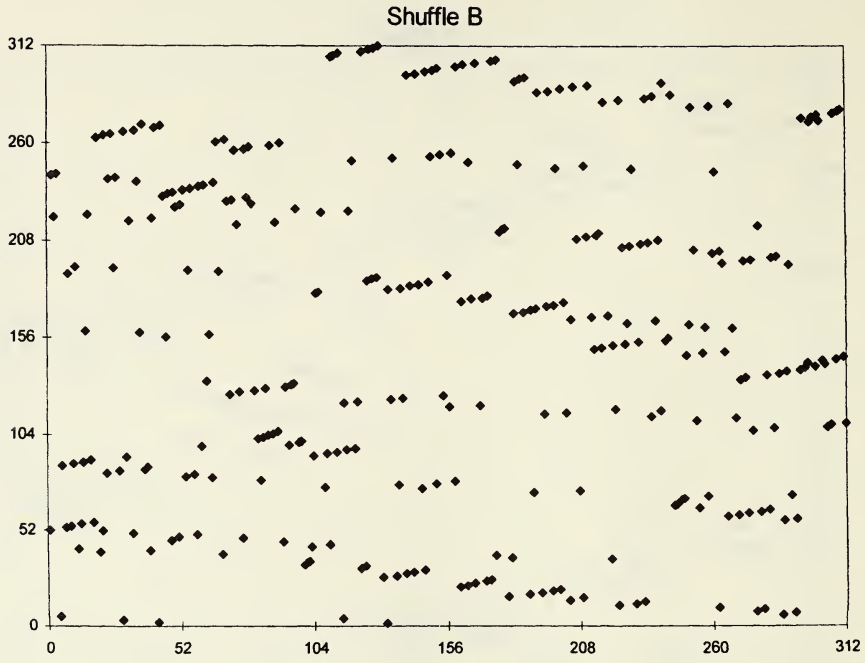
[364] *Id.* (Springer, J., dissenting).

# APPENDIX A



# APPENDIX B

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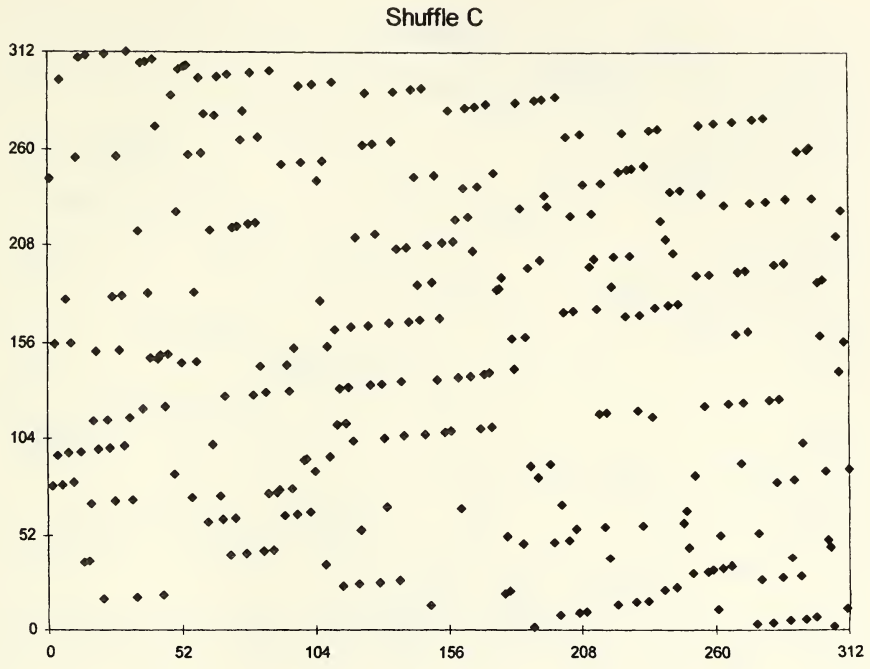
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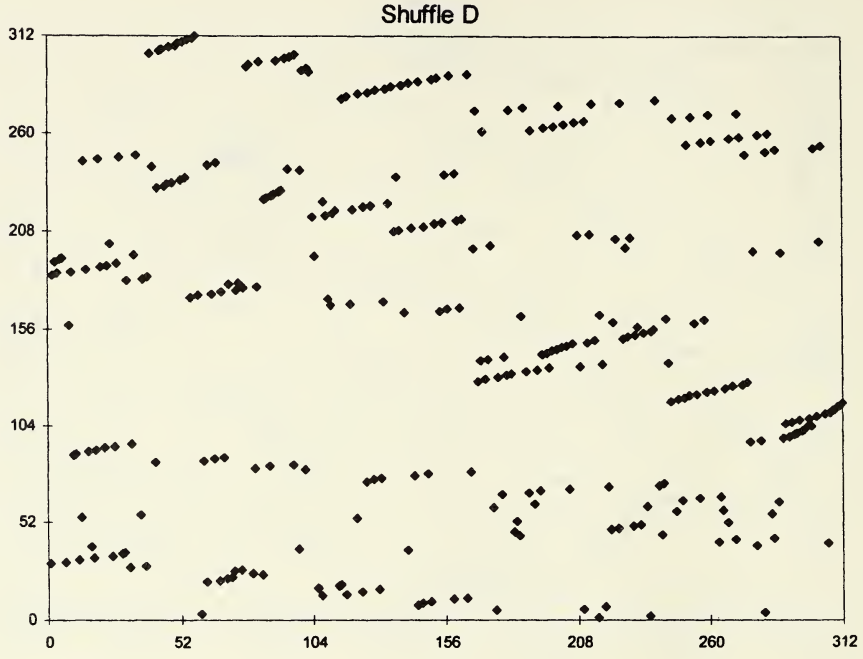
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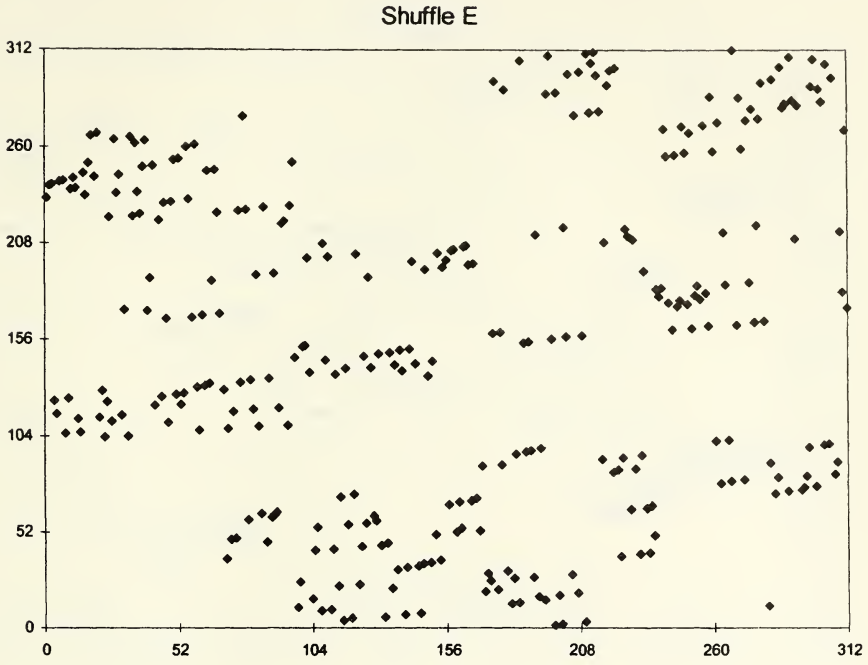
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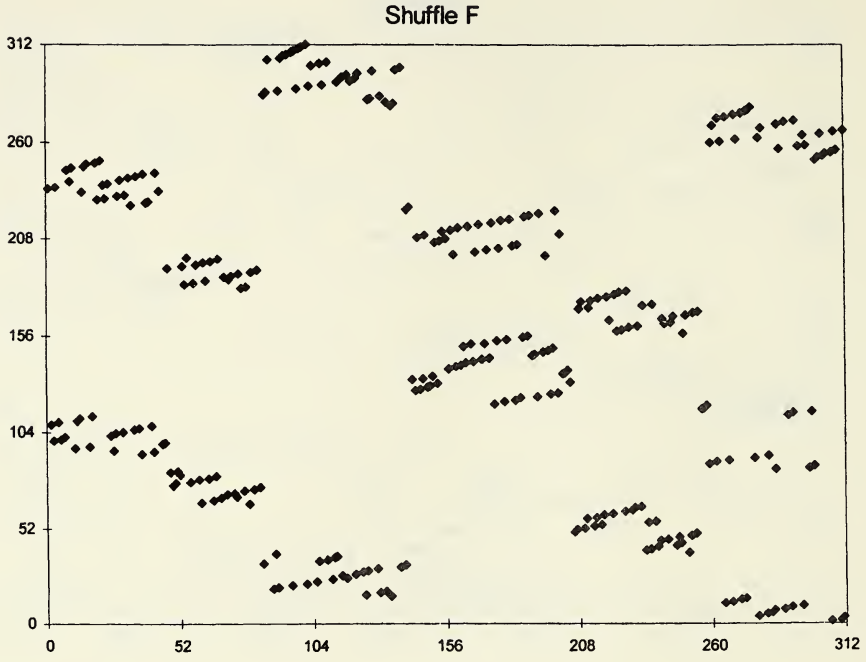
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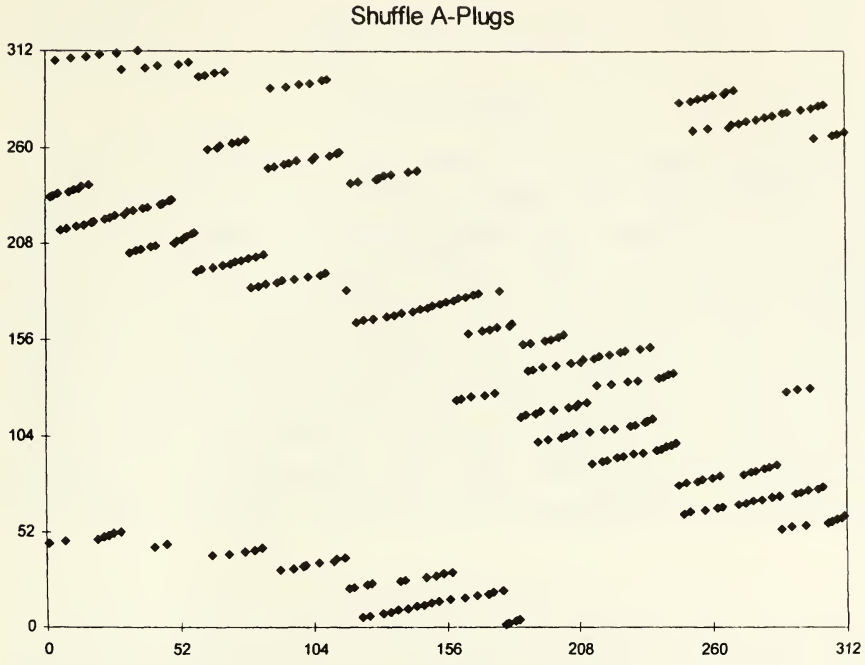
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# GAMBLING IN THE TWENTY-FIRST CENTURY: JUDICIAL RESOLUTION OF CURRENT ISSUES

*John M. Norwood*[*]

## INTRODUCTION

Few industries in the past five years have enjoyed as rapid a growth as the gaming industry.[1] Virtually every state allows some form of licensed gambling, from casinos, to dog and horse racing, to state lotteries.[2] The increase in gaming opportunities has resulted in an increase in gambling related litigation. The recent reported cases deal with such diverse topics as jurisdiction, conflicts of law, contracts, bankruptcy, administrative law, criminal law and many others. This paper will discuss and analyze gambling related cases decided by American courts since the year 2000. These cases demonstrate that basic principles of law have been and likely will continue

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[1] One illustration of the magnitude of the gaming industry is the recent announcement of the acquisition of Caesars Entertainment, Inc. by Harrah's Entertainment, Inc. The cost of the acquisition was reported at $5.18 billion. *See* Bloomberg News Service, *Harrah's to Acquire Caesars for About $5.18 Million* (July 15, 2004), *available at* http://quote.bloomberg.com/apps/news?pid=100000068.sid=a5Fghe9J.2.M&refer=home# (last modified July 15, 2004). It eclipsed the MGM Mirage-Mandalay Resort Group merger which was announced the previous month. Harrah's purchase produces a company with annual revenues of $8.8 billion. *Id.* MGM Mirage and Mandalay's combined revenue is $6.4 billion. *Id.*

[2] The only remaining states which do not allow any form of gambling are Utah and Hawaii. *See* UTAH CODE ANN. § 76-10-1102 (1996); HAW. REV. STAT. ANN. § 712-1223 (West 1994).

to be applied by American courts in cases involving gambling transactions.

## WHAT IS GAMBLING?

A gambling contract has been defined as "a contract in which two parties wager something, especially money, for a chance to win a prize."[3] According to Professor Corbin, people have been known to hazard a bet on all manner of unpredictable eventualities, including horse races, ball games, elections, the turn of a die, the fall of a card, or the sex of a mysterious personage.[4] In the twenty-first century the financial rewards associated with operating gambling establishments are well known, and the temptation to engage in such activities despite the prohibitions of law cannot always be resisted. In such circumstances, entrepreneurs will often endeavor to offer gambling opportunities to customers, all the while maintaining that their activities do not in fact constitute gambling. A good illustration of this is the case of *Twenty-Nine (29) Gambling Devices v. Texas.*[5] In this case an establishment known as "Mr. Bigs Amusements" offered customers the opportunity to play "games of chance" which generated a ticket once a certain number of points was won.[6] Each ticket could be redeemed for a five dollar gift certificate from one of several local merchants, including Wal-Mart.[7] Pursuant to a sting operation, officials confiscated the machines and sought forfeiture as gambling devices.[8] The defendants argued that the seized machines were not gambling devices as they were covered by the "fuzzy animal" exclusion[9] permitting the dispensing of "noncash merchandise prizes, toys or novelties."[10] Unfortu-

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[3] BLACK'S LAW DICTIONARY 345 (8th ed. 2004).

[4] ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 86.1 (2003).

[5] 110 S.W.3d 146 (Tex. App. 2003)

[6] *Twenty-Nine (29) Gambling Devices*, 110 S.W.2d at 147-48.

[7] *Id.* at 148.

[8] *Id.*

[9] *Id.* at 149 n.1.

[10] *See* TEXAS PENAL CODE § 47.01(4)(B). The relevant language of the statute states:

nately for the defendants, only a few weeks before the Texas Court of Appeals issued its decision in this particular case, the Texas Supreme Court in *Hardy v. Texas*[11] ruled that gift certificates from retailers did not qualify as noncash prizes under the "fuzzy animal" exception.[12] The court of appeals therefore affirmed the trial court's summary judgment in favor of the state and upheld the forfeiture.[13]

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> Gambling device
>
> . . . .
>
> . . . does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.

Texas is not the only state to exempt certain awards from the gambling laws. Arkansas allows for a similar exemption for games of chance where the prize to be won is less than $12.50. ARK. CODE ANN. § 26-57-402 (Michie 1987). This was intended to allow such places as Chuck E. Cheese to allow small children to play games while waiting for their pizza. The law is known as the "Chuck E Cheese law."

[11] 102 S.W.3d 123 (Tex. 2003).

[12] *Hardy*, 102 S.W.3d at 131-32.

[13] *Twenty-Nine (29) Gambling Devices*, 110 S.W.3d at 151-52. A similar outcome was reached in the case of *Aslany v. Texas*, No. 05-03-00914-CR, 2004 Tex. App. LEXIS 1651 (Tex. App. Feb. 19, 2004) in which the Texas Court of Appeals upheld the defendant's conviction for operating a gambling house. The gambling machines in question were known as "eight liners." *Aslany*, 2004 Tex. App. LEXIS 1651, at *12. Although the defendant raised the issue that the machines were in fact not gambling devices due to the "fuzzy animal" exception, the court cited *Hardy* as imposing on the defendant the burden of proving that the machines were not gambling devices, or that the exception applied. *Id.* at *13. Since the defendant in this case did not introduce any evidence whatsoever, the court determined that there was no doubt that the machines were in fact gambling devices. *Id.* at *14. However, in a case decided in March of 2004, the Texas Court of Appeals considered a case involving the civil forfeiture of "eight liners." In *Forty-One (41) Gambling Devices v. Texas*, the trial court issued a summary judgment in favor of the state. No. 07-03-0133-CV, 2004 Tex. App. LEXIS 2896 (Tex. App. Mar. 31, 2004). The court of appeals reversed, finding that the state had not produced evidence that it had complied with the procedural requirements of Article 18.18 of the Texas Code of Criminal Procedure. *Forty-One (41) Gambling Devices*, 2004 Tex. App. LEXIS 2896, at *9-10. The court held that the state was required to produce summary judgment evidence of compliance with the article,

A similar unsuccessful effort to evade the gambling laws was reported in the case of *Commonwealth v. Wintel, Inc.*[14] Here video slot machines were confiscated by the Philadelphia Police Department.[15] The machines were constructed in such a way as to allow the player to push a button on one side of the machine which would generate a receipt, and this receipt would be taken to the office for payment.[16] Prior to collecting any money, the player had to sign a document stating that the award was given to her at no cost.[17] Confronted with the very real possibility that this somewhat simplistic ploy would be unavailing, the operators of the business claimed that they were exempt from the gambling laws due to the fact that a portion of the proceeds were paid to charities, and hence lacked the required "consideration" aspect of a gambling transaction.[18] The court rejected this argument, stating:

> The machines are constructed for gambling . . . . [T]he element of consideration is present. This conclusion is not altered by the fact that some of that consideration is used for charitable purposes. Were we to accept Appellant's argument, the owner of a *per se* gambling device could evade 18 Pa. C.S. § 5513 simply by making a token contribution to a charity out of the revenue generated by the machine's use.[19]

The court also rejected the argument that the machines

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which it failed to do. *Id.* at *10. Specifically noted as lacking was evidence of notice provided by the magistrate and a show cause hearing conducted by the trial judge. *Id.* The court did not consider the defendant's substantive allegation that the machines did not constitute gambling devices due to the "fuzzy animal" exception. *Id.*

[14] 829 A.2d 753 (Pa. Commw. Ct. 2003).

[15] *Wintel, Inc.*, 829 A.2d at 754.

[16] *Id.* at 755.

[17] *Id.*

[18] *Id.* at 756. The machines were in fact located in a building the first floor of which was used to conduct bingo games for charities (Bible Charity). *Id.* The defendants contended that they contributed 3.9% of the total "contributions" to Bible Charity. *Id.* The statute that they relied upon was the "Solicitation of Funds for Charitable Purposes Act of 1990," but the court held that this act only dealt with "charities fraud," which was not alleged in this case. *Id.* at 756-57.

[19] *Id.* at 758 (footnote omitted).

could not be considered gambling devices since they were in part intended to encourage charitable gift giving, noting that even if this were the case it would not provide an adequate defense.[20] The court stated that "[t]he standard is not whether the machines could possibly be used for a purpose, such as charitable gift giving, but whether they are 'intrinsically connected' to gambling. We conclude that the machines are gambling devices *per se*, and Appellant did not meet its burden of proving lawful possession . . . ."[21]

In the cases previously cited there was little doubt that a winning player would receive something of value (either cash or merchandise), so that the holding that the machines were in fact "gambling devices" was an easy one. In the case of *Mississippi Gaming Commission v. Henson*[22] the Mississippi Supreme Court addressed the more troubling issue of whether a gambling device could be confiscated even without proof that consumers could receive a payoff from the machine.[23] In this case the court held that under Mississippi law it was unlawful for anyone to possess a "slot machine" (in this case a slot machine called a "Cherry Master") even if the only "payout" was additional games.[24] The court reasoned that "[t]he award of credits by the Cherry Master to play free additional games is likewise something of value, as a credit to play a free game necessarily has the same value as the amount it would cost to play that game."[25] The court cited decisions from a number of states, including one from Ohio in which the Ohio Court of Appeals was confronted with the same "Cherry Master" ma-

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[20] *Id.*

[21] *Id.* at 758-59.

[22] 800 So. 2d 110 (Miss. 2001).

[23] *Henson*, 800 So. 2d at 112.

[24] *Id.* at 115. A "Cherry Master," is an electronic machine which generates a series of symbols (cherries, bananas, etc.) in a typical three by three slot machine format.

[25] *Id.* Interestingly, the statute in question specifically provides that "pinball machines" (as opposed to slot machines) which do not return to the player anything but additional games were not to be considered gambling devices. MISS. CODE ANN. § 97-33-7 (2000).

chine as the Mississippi court.[26] The Ohio court stated that "amusement has value and added amusement has additional value, and where added amusement is subject to be procured by chance without the payment of additional consideration thereof, there is involved in the game the elements of gambling, namely, price, chance and a prize."[27]

The Mississippi court was also confronted with the question of whether a "quarter pusher" machine was an illegal gambling device.[28] The court had no trouble ruling that this was indeed a gambling device as it involved the elements of prize (the money to be won), consideration (the quarter invested by the player), and chance (the possibility of the quarters falling).[29] With regards to the issue of whether this was a game of chance or skill, the court quoted from a federal case in which it was stated that:

> There is virtually no skill involved in operating these quarter fall machine[s]. The movable slot gives the appearance that one can control the fall of the quarters in [a] meaningful manner. This, however, is illusory. The player cannot control the sweepers, and really has no control over when and how quarters fall into the payoff shute. The payoff depends exclusively on how the coins are piled up at the time the player inserts quarters. It is clear that these machines are intended to deliver quarters as a result of an element of chance. Therefore, they are gambling devices under 15 U.S.C. § 1171(a)(2).[30]

It is unclear why the court was so concerned with the issue of whether the game was one of "chance" as opposed to "skill." While the federal law at issue in the quoted case did apply only

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[26] *Henson*, 800 So. 2d at 115.

[27] State v. Brown, 688 N.E.2d 295, 297 (Ohio Ct. App. 1996), *quoted in Henson*, 800 So. 2d at 115.

[28] *Henson*, 800 So. 2d at 113. This device involves a player dropping a quarter into a slot on the machine. Depending on where the quarter falls, it might or might not cause other quarters to drop onto a lower shelf to be dispensed to the player.

[29] *Id.* at 114.

[30] United States v. Two (2) Quarter Fall Machines, 767 F. Supp. 153, 156 (E.D. Tenn. 1991), *quoted in Henson*, 800 So. 2d at 114.

to "games of chance," the Mississippi law was not so limited. It could be argued that even if the court had determined that the "quarter pusher" game involved substantial elements of skill, it could still be considered an illegal gambling device under Mississippi law.

The supreme court of the state of Arkansas also had occasion to consider the question of whether certain pieces of equipment constituted illegal gambling devices. In *State v. 26 Gaming Machines*,[31] the state confiscated a number of machines, four of which were upright, free standing machines,[32] and three of which were counter-top Megatouch machines with touch screens.[33] With regards to the free standing machines, the lower court ruled that the devices constituted "gambling devices" *per se* and both the machines and the money contained therein were subject to seizure.[34] This ruling was not appealed, so the only matter before the court related to the counter-top machines.[35] The Megatouch machines contained fifty to seventy different games, including poker and blackjack.[36] There was no pay out mechanism (such as chutes or pre-printed tickets).[37] Consequently, both the trial court and the state supreme court held that these machines could not be considered gambling devices *per se*.[38] The remaining question was whether the three machines as actually used constituted gaming devices.[39] The court affirmed the lower court ruling that

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[31] 145 S.W.3d 358 (Ark. 2004).

[32] *26 Gaming Machines*, 145 S.W.2d at 369-70. These were identified as "Fruit Bonus 96 machines." *Id.* at 370.

[33] *Id.* In fact the state confiscated twenty-six machines, but with respect to nineteen of these the state either settled the matter before trial, or the machines were deemed to be inoperable and were returned to their owners or forfeited to the state because no claim was made by the owner. *Id.* at 369.

[34] *Id.* at 370.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 370, 372. The court reasoned that to rule that a machine was a gambling device per se simply because it offered a game of poker would mean that both a personal computer as well as a child's hand held computer game were also gambling devices. *Id.* at 373.

[39] *Id.*

this was not the case.[40] No tokens, money, or prizes were offered to the winning player.[41] However, the court noted that on two of the machines a program had been installed which rewarded the winning player by allowing him or her to view a virtual person take off his or her clothes.[42] The state argued on appeal that this visual reward resulted in the machines being considered gambling devices.[43] The supreme court disposed of this issue by noting that this argument had not been made to the lower court, and hence could not be considered on appeal.[44] However, the court stated that even if the argument could be considered "this court has never held that an intangible reward, such as viewing nudity, qualifies as a reward for gambling purposes.[45] In essence, the machines as used were nothing more than amusement devices in which "a player inserts money and can play gambling-like games but never receives anything in return except amusement.[46]

This issue of "skill" or chance" was confronted by two New York City judges in the cases of *People v. Mohammed*[47] and *People v. Denson*.[48] Both cases involved the classic New York City game known as the "shell game" or "three card monte." In the "shell game" the operator manipulates shells (usually three) and a single ball or similar small device, and then encourages players to guess under which shell the ball is located. "Three card monte" involves similar sleight of hand, in which the player must correctly guess where the "winning" card is located out of three possible choices. Street "performers" in New York City are so skilled that it is virtually impossible for a player to successfully pick out the winning card or shell. Both games are specifically made illegal by the New York Adminis-

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[40] *Id.* at 374-75.
[41] *Id.* at 374.
[42] *Id.*
[43] *Id.*
[44] *Id.* (citing Parker v. Perry, 131 S.W.2d 338 (Ark. 2003)).
[45] *Id.*
[46] *Id.*
[47] 724 N.Y.S.2d 803 (N.Y.C. Crim. Ct. 2001).
[48] 745 N.Y.S.2d 852 (N.Y.C. Crim. Ct. 2002).

trative Code.[49] But do such activities violate New York state gambling laws? In the *Mohammed* case, the defendant was charged with violating New York Penal Law section 225.05, which defines gambling as when one "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence."[50] The defendant argued that the shell game (or its counterpart three card monte) was a game of skill, not of chance, and therefore not within the definition of gambling in the Penal Law in question.[51] The court accepted this defense, and dismissed the state gambling charge.[52] The court stated that:

> This court agrees . . . that three card monte, and by inference the shell game, is not a game of chance. When played fairly, the game is one of skill where the accuracy of the eye of the player competes with the speed of the hand of the dealer. It is noted that fans at Yankee Stadium are entertained between innings by an electronic version of the shell game projected on the stadium scoreboard. The fans attempt to follow the image of a baseball over which is superimposed one of three Yankee baseball caps shuffled at increasing speed.[53]

In the *Denson* case the court was confronted with the same question, but came up with an entirely different answer. The court rejected the precedent set in *Mohammed*, and stated that:

> [T]his court agrees with the analysis in *People v. Turner*, and finds that even "when played fairly" three card monte is essentially a game of chance, wherein the player has a one-in-

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[49] N.Y. COMP. CODES R. & REGS. tit. 10, § 161 (2004).

[50] *Mohammed*, 724 N.Y.S.2d at 805; *see* N.Y. PENAL LAW § 225.05 (McKinney 1999).

[51] *Mohammed*, 724 N.Y.S.2d at 805.

[52] *Id.* at 807. The court did find the accused guilty of violating the city ordinance. *Id.* The court rejected the argument that the statute required that the player actually receive money in order for there to be a violation. *Id.* The court ruled that there need only be the "expectation that the player will receive money if he or she correctly selects the designated object." *Id.*

[53] *Id.* at 806. The court cited a similar ruling from a New York judge in a 1994 case, People v. Hunt, 162 Misc. 2d 70 (N.Y.C. Crim. Ct. 1994).

> three chance of selecting the "right" card if he can resist the operator's manipulations and simply choose randomly. Moreover, it is worth mentioning that the game does not enjoy a reputation for being played fairly even as a game of chance. "Not content to have the odds two to one in their favor, history and practice reveal a number of swindles and hustles in order to insure the operator's success.[54] Three card monte masquerades as a game of skill in order to lure players, but in reality, it is *at best* a game of chance.[55]

It has often been argued that certain kinds of extremely speculative business arrangements have the characteristics of gambling, but so long as there is an underlying business activity courts have not categorized such activities as gambling. In the case of *Korea Life Insurance Co. v. Morning Guaranty Trust Co.*,[56] a federal trial judge stated that "[d]erivatives transactions, forward contracts and swap agreements in currencies and commodities are not considered illegal gambles, and do not violate New York's gambling statute."[57]

## JURISDICTION AND CONFLICTS OF LAW

Gambling activities involving parties from different states and/or situations in which two parties from the same state go to a third state to gamble have long presented interesting jurisdictional and conflicts of law issues. One case involving jurisdictional issues and the use of a "forum selection clause" is *Paradise Enterprises Ltd. v. Sapir.*[58] In this case the defendant, a resident of New York, was given a complimentary trip

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[54] Ironically, the court in the Mohammed case made the same observation: "The court is very much aware of the fact that three-card monte and the shell game, as they are played in the streets of New York, almost always involve trickery and deception." *Mohammed*, 724 N.Y.S.2d at 806.

[55] People v. Denson, 745 N.Y.S.2d 852, 856 (N.Y.C. Crim. Ct. 2002) (quoting People v. Williams, 402 N.Y.S.2d 310 (1978)) (internal citations omitted). The court also held that the person encouraging people to bet on the game was criminally liable as an accessory. *Id.*

[56] 269 F. Supp. 2d 424 (S.D.N.Y. 2003).

[57] *Korea Life Ins. Co.*, 269 F. Supp. 2d at 442.

[58] 811 A.2d 516 (N.J. Super. App. Div. 2002), *cert. denied*, 816 A.2d 1050 (N.J. 2003).

to the Bahamas by the plaintiff, a Bahamian corporation having its principal place of business at Atlantis Paradise Hotel in the Bahamas.[59] Plaintiff's affiliate, Sun Marketing, was registered to do business in New Jersey.[60] The contract signed by the defendant as part of the junket gave the defendant a line of credit, and included a forum selection clause that designated New Jersey as the agreed forum for settling any disputes.[61] The defendant's gambling activities proved to be less than successful, as indicated by the fact that he was sued for $1,120,000 as a result of markers signed during his four day visit to the Bahamas.[62] The defendant moved to have the case dismissed on the basis of the forum non conveniens doctrine.[63] The lower court agreed with this argument and dismissed the case, pointing to the fact that the defendant was from New York, the plaintiff was from Florida (this in fact was incorrect: the plaintiff was a Bahamian corporation), the plaintiff did not operate any business in New Jersey and the credit agreement was signed in the Bahamas.[64] The appellate court reversed, holding that the lower court failed to correctly apply the law pertaining to forum selection clauses.[65]

The court began by noting that forum selection clauses are "prima facie valid and enforceable in New Jersey."[66] The only exceptions recognized in New Jersey are: 1) fraud or "overweening" bargaining power; 2) enforcement would violate public

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[59] *Paradise Enters. Ltd.*, 811 A.2d at 518-19.

[60] *Id.*

[61] *Id.* at 519.

[62] *Id.*

[63] *Id.*

> Under so-called "forum non conveniens" statutes or provisions in many state jurisdictions, the convenience of witnesses is a ground for a change of venue in an action. The exact language of such provisions varies from jurisdiction to jurisdiction, most such provisions authorizing a change of venue if the convenience of witnesses" and "the ends of justice would be promoted thereby . . . ."

92A C.J.S. *Venue*, § 195 (2000) (footnotes omitted).

[64] *Paradise Enters. Ltd.*, 811 A.2d at 519-20.

[65] *Id.* at 529.

[66] *Id.* (quoting Caspi v. Microsoft Network, 732 A.2d 528 (N.J. App. Div. 1999)).

policy; and 3) enforcement would seriously inconvenience the trial.[67] The court found that none of the exceptions applied in this case. Furthermore, the court noted that the lower court looked only to the law associated with the forum non conveniens doctrine.[68] The court noted that

> [t]here seems to be no clear rule as to whether forum non conveniens analysis is required in a case where an express forum selection clause exists . . . . Settled principles of New Jersey law with respect to forum selection agreements provide adequate protection for private and public interests, so that where such an agreement exists it is unnecessary to rely on *forum non conveniens* doctrine.[69]

The court then stated that even if the doctrine were used there were no factors which would outweigh the choice of forum which was made via the forum selection clause.[70] The court also rejected the defendant's argument that since he was a New York resident and had not personally visited Sun Marketing in New Jersey, the choice of law in the forum selection clause was unreasonable.[71] The court held that the New Jersey contacts were not insignificant.[72] The evidence indicated that the defendant was in fact in New Jersey at the time he was first approached about the trip, and furthermore Sun Marketing had its principal office in New Jersey.[73] In addition, the evidence showed that the defendant "reached out" to the New Jersey office numerous times regarding the Bahama trip, so that contacts were far more than what was minimally required

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[67] *Id.* at 529.

[68] *Id.* Factors considered by the trial court were: public and private interest factors, residences of each party and administrative difficulties in trying the case in New Jersey. *Id.* at 522.

[69] *Id.* at 523 (footnote omitted).

[70] *Id.* The court noted that there were no public interest factors involved (such as mass tort issues requiring numerous witnesses), and there were no private issues involved, in that the defendant specifically agreed to New Jersey as a forum. *Id.*

[71] *Id.* at 527.

[72] *Id.*

[73] *Id.*

for the forum selection clause to be enforced.[74]

Jurisdictional issues can even arise in cases where both parties are from the same state, and the litigation is initiated in that state. In *Williams v. Aztar Indiana Gaming Corp.*,[75] the plaintiff, a resident of Indiana, sued the defendant, the owners of an Indiana riverboat casino, in federal court.[76] He claimed that the casino caused him harm by permitting him to gamble in their casino even though he was known to have mental health problems.[77] He also claimed that the casino mailed him materials which fraudulently suggested that he could win if he would come and gamble at defendant's casino, and that this constituted a violation of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act.[78] The trial court issued a summary judgment in favor of the defendant.[79] The appellate court also ruled in favor of the defendant, but on jurisdictional grounds.[80] The court held that the allegations of RICO violations were "*so* feeble, so transparent an attempt to move a state-law dispute to federal court . . . that it does not arise under federal law at all."[81] The court further noted that the plaintiff did not appeal the trial judge's dismissal of his RICO claim, which was the sole basis for invoking federal jurisdiction.[82] The court then remanded the case back to the district court with instructions to dismiss the case for lack of subject matter jurisdiction.[83]

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[74] *Id.*

[75] 351 F.3d 294 (7th Cir. 2003).

[76] *Williams*, 351 F.3d at 296.

[77] *Id.* at 297.

[78] *Id.* at 297; *see* 18 U.S.C. §§ 1961-68 (2004).

[79] *Williams*, 351 F.3d at 297.

[80] *Id.* at 298-300.

[81] *Id.* at 299. (quoting Oak Park Trust & Sav. Bank v. Therkildsen, 209 F.3d 648, 651 (7th Cir. 2000)) (alteration in original).

[82] *Id.* at 297-98.

[83] *Id.* at 300. The court also stated that "[b]ecause this court concludes that Williams's RICO claim was frivolously filed solely to invoke the jurisdiction of the federal courts, we declare this appeal is also frivolous, and we direct plaintiff to show cause within 14 days why he should not be sanctioned under our Rule 38." *Id.* The question of whether a casino can be held liable to a player for not barring him or her from playing is discussed later in this paper in the section enti-

A conflicts of law issue was raised in the case of *Bedle v. Kowars.*[84] This case involved two women who resided in Ohio and who set out for a casino in Lawrenceburg, Indiana.[85] Prior to their departure they allegedly agreed to split all of their winnings.[86] One of the two pulled a lever on a slot machine that returned a jackpot in excess of $130,000.[87] As might be expected there then arose a dispute as to whether there was an agreement to split the winnings.[88] The plaintiff brought suit in Indiana, even though both of the parties lived in Ohio.[89] The defendant filed a motion to dismiss claiming a lack of subject matter jurisdiction and that the plaintiff failed to state a claim upon which relief could be granted.[90] The trial court granted the motion to dismiss, but it is unclear whether the dismissal was related to a lack of jurisdiction or based upon failure to state a claim upon which relief could be granted (a substantive issue).[91] In any event, the appellate court devoted most of its attention to the question of conflicts of law.[92] This is due to the fact that in Ohio an agreement to share gambling winnings is legally unenforceable,[93] whereas in Indiana an agreement to

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tled "rights and obligations of licensed casinos."

[84] 796 N.E.2d 300 (Ind. Ct. App. 2003).

[85] *Bedle*, 796 N.E.2d at 302.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* There is no indication why the lawsuit was filed in Indiana, although the most likely reason is that agreements to share gambling winnings are not enforceable in Ohio.

[90] *Id.* at 302.

[91] *See id.* The concurring opinion provides additional information about the confusion associated with the motions to dismiss. *Id.* at 304-05 (Brook, C.J., concurring). The defendant withdrew her motion to transfer the case on the basis of forum non conveniens, and the plaintiff did not object.*Id.* (Brook, C.J., concurring). However, when the trial judge issued his ruling dismissing the case he stated as his reasons:contracts 1) that the contract was negotiated and made in Ohio; 2) that the parties are residents of Ohio; 3) that the contract was to be performed in Ohio; and 4) that the witnesses are in Ohio. *Id.* (Brook, C.J., concurring). These all relate to either jurisdiction or forum non conveniens, yet the majority opinion seems to treat the appeal as based upon a dismissal of the case based upon conflicts of law issues. *Id.* (Brook, C.J., concurring).

[92] *Id.* at 302-03.

[93] *Id.* at 303. The statute referenced by the court states that promises and

share gambling winnings would have been enforceable.[94] The court applied the classic "most significant contacts" test to decide the case.[95] According to the court, the factors to be considered are: 1) place of contracting; 2) place of negotiation of the contract; 3) place of performance; 4) location of subject matter; and 5) domicile of the parties.[96] In this case, all of the facts suggested that Ohio had the most intimate contacts (the contract was made there, it was negotiated there, the money would have been divided up there, and both parties resided there). Applying Ohio law, the agreement, if it was in fact made, was not legally enforceable.[97]

A similar case was decided by the Bankruptcy Appellate Panel for the Ninth Circuit. In this case, *Bradley v. Miller* (*In re Miller*),[98] the debtor, a resident of California, signed a $40,000 casino marker in favor of the Mandalay Bay Casino in Las Vegas.[99] The marker was defaulted, and the debtor filed

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agreements relating to gambling are void. OHIO REV. CODE ANN. § 3763.01 (Baldwin Supp. 2002).

[94] *Bedle*, 796 N.E.2d at 303.

> [H]ad the circumstances been otherwise, and Indiana law applied here, the gambling contract between the Bedle and Kowars might very well have survived a motion to dismiss. As our supreme court observed in *Kaszuba v. Zientara*, 506 N.E.2d 1, 3 (Ind. 1987), "there is nothing perceptively evil, vicious, wicked, immoral or shocking to the prevailing moral sense" regarding such agreements. Moreover, our General Assembly has expressly authorized gambling to be conducted by licensed owners on riverboats.

*Id.*

[95] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

[96] *Bedle*, 796 N.E.2d at 302. These criteria are the same as those mentioned in the Restatement.

[97] *Id.* at 303. Perhaps the most remarkable aspect of this case is revealed in the concurring opinion. There, it is noted that there is another case pending in the same court by another plaintiff against the same defendant, also alleging the right to one half of a jackpot won by the defendant. *Id.* at 304 (Brook, C.J., concurring). It is hard to say which is more improbable: One person winning two large jackpots within a short period of time, or one person agreeing to split winnings with a friend immediately after having been sued as a result of a similar agreement with another friend.

[98] 292 B.R. 409 (B.A.P. 9th Cir. 2003), *exception to discharge denied*, 310 B.R. 185 (Bankr. C.D. Cal. 2004).

[99] *In re Miller*, 292 B.R. at 411.

for bankruptcy.[100] The bankruptcy judge dismissed the claim on the basis of the fact that gambling debts were not enforceable in California.[101] However, this ruling was reversed on appeal.[102] The court stated that:

> With certain exceptions not relevant here, and in the absence of an effective choice of law by the parties, the validity of a contract is determined in accordance with § 188 of the Restatement. Under that section, "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which . . . has the most significant relationship to the transaction and parties."[103]

In this case the court took into account the factors of: a) the place of contracting (Nevada); b) the place of negotiation (Nevada); c) the place of performance (Nevada); d) the location of the subject matter (not indicated); and e) the domicile of the parties (both).[104] The court concluded by stating that "the fact that debtor traveled to Nevada and sought out a loan there from Mandalay tips the balance in favor of applying Nevada law."[105]

In the case of *Mashantucket Pequot Gaming Enterprise v. Renzulli*[106] basic conflicts of law principles resulted in a New York court enforcing a gambling debt even though New York law would not support such an award.[107] In this case plaintiff was the operator of Foxwoods in Connecticut, the largest casino in the world.[108] The entity is entirely owned by the Mashantucket Pequot Tribe, a sovereign Indian Nation.[109] During a visit to Foxwoods the defendant executed two casino

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[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 413-14 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971)) (footnote omitted) (alterations in original).
[104] *Id.* at 414.
[105] *Id.*
[106] 728 N.Y.S.2d 901 (N.Y. 2001).
[107] *Renzulli*, 728 N.Y.S.2d at 903.
[108] *Id.* at 901.
[109] *Id.*

markers totaling $5,000.[110] The markers were not paid, and plaintiff obtained a default judgment against the defendant in a Tribal Court.[111] When the judgment was not paid the plaintiffs filed a complaint against the defendant in state court in New York.[112] The New York court ruled that even though gambling debts were not enforceable in either New York or Connecticut, they were enforceable under the Tribal-State Compact.[113] The court noted an obligation to "look to the laws of the jurisdiction where the debt was incurred to determine the validity and enforceability of such debt."[114] As a matter of policy, it was noted that "[t]he [c]ourt is cognizant of the holding in *Intercontinental Hotels* [*v. Golden*] that 'injustice would result if citizens of this State were allowed to retain the benefits of the winnings in a State where such gambling is legal, but to renege if they were losers.'"[115]

## CONTRACTS

In the *Mashantucket* case, as well as several others previously discussed, it was mentioned that in those jurisdictions where gambling is legal, contracts predicated upon legal gambling are as enforceable as any other form of contract.[116] It has also been held that an agreement to share gambling winnings is legally enforceable, even though the agreement was entered into in a jurisdiction that does not permit gambling.[117] However, the *Bedle* case held that such sharing of

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[110] *Id.* at 902.

[111] *Id.*

[112] *Id.* The reported decision does not clearly state whether the plaintiff was seeking to have the judgment in Tribal Court enforced in New York on the basis of comity, or whether the plaintiff was filing a completely new action seeking the enforcement of a gambling debt.

[113] *Id.* at 903.

[114] *Id.* at 902.

[115] *Id.* at 903 (quoting Intercontinental Hotels v. Golden, 15 N.Y.2d 9, 15 (1964)).

[116] *Id.* at 901.

[117] *See* Castilleja v. Camero, 414 S.W.2d 424, 427-28 (Tex. 1967). This case involved lottery tickets purchased in Mexico by two Texas residents. *See also* Miller v. Radikopf, 228 N.W.2d 386 (Mich. 1975).

winnings was not permitted based upon the statutory law of the state of Ohio.[118] Another case which involved an alleged agreement to share gambling winnings is *Iacono v. Lyons.*[119] In this case plaintiff and defendant had been friends for almost thirty-five years, but this friendship came to an end as a result of a disagreement as to whether the two had agreed to share gambling winnings.[120] The plaintiff contended that she was invited to accompany the defendant on a trip to Las Vegas because the defendant thought that the plaintiff was "lucky."[121] In addition, the plaintiff claimed to have had a dream in which she hit it big on a Vegas slot machine.[122] The plaintiff asserted that she agreed to go on the trip only if the two agreed to split any winnings fifty-fifty.[123] While in Vegas the two started playing the slots at Caesars Palace.[124] The plaintiff contended that after losing forty-seven dollars the defendant wanted to quit and go see a show, but the plaintiff persuaded her to continue.[125] She even identified a slot machine that looked like the one in her dreams.[126] The machine did not pay on the first try, but just after saying to the plaintiff "this one's for you, Puddin" defendant dropped in one more coin, and the result was a $1,908,000 payout.[127]

When the defendant refused to share any portion of the winnings, the plaintiff sued for breach of contract.[128] The trial court rendered summary judgment in favor of the defendant on the basis of lack of consideration as well as failure to satisfy the Texas statute of frauds.[129] The court of appeals reversed on both points, and remanded the case back to the lower court

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[118] Bedle v. Kowars, 796 N.E.2d 300, 303 (Ind. Ct. App. 2003).
[119] 16 S.W.3d 92 (Tex. Ct. App. 2000).
[120] *Iacono*, 16 S.W.3d at 93.
[121] *Id.* at 93.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*

for trial.[130] With regards to the consideration issue the appellate court held that the agreement by the parties to split their winnings constituted consideration.[131] In the words of the court:

> The plaintiff alleged she promised to share one-half of her winnings with the defendant in exchange for the defendant's promise to share one-half of her winnings with the plaintiff. These promises, if made, represent the respective benefits and detriments, or the bargained for exchange, necessary to satisfy the consideration requirement.[132]

With regards to the statute of frauds, the defendant argued that the agreement, if any, was unenforceable as it could not be performed within one year.[133] The winnings from Caesars Palace were to be paid out to the winner over twenty years.[134] The court noted that this portion of the statute of frauds "does not apply if the contract, from its terms, could possibly be performed within a year—however improbable performance within one year may be."[135] The court ruled that in this case the agreement to share winnings could have been performed within one year if some lesser sum (such as $200) had been won.[136] Under those circumstances payment would have been made by the casino to the player immediately. Hence, in the eyes of the court it was possible for the contract to be performed within one year depending upon the amount of the winnings, so the statute of frauds did not apply.

An interesting case involving the refusal by a casino to pay a winning player was *Gottlieb v. Tropicana Hotel & Casino*.[137] In this case the plaintiff waited in line for about five minutes

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[130] *Id.* at 95.
[131] *Id.* at 94.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 95 (citing Miller v. Riata Cadillac Co., 517 S.W.2d 773, 775 (Tex. 1974); Gerstacker v. Blum Consulting Eng'rs, Inc., 884 S.W.2d 845, 849 (Tex. Ct. App. 1994)).
[136] *Id.* at 95.
[137] 109 F. Supp. 2d 324 (E.D. Pa. 2000).

in order to take a spin on Tropicana's "Fun House Million Dollar Wheel."[138] The plaintiff contends that immediately after swiping her player's card, the wheel was spun, with the result that the wheel landed on the "grand prize" of $1 million.[139] The casino says that the wheel never landed on the $1 million prize.[140]

The court began its decision by discussing the "conflicts of law" issues.[141] After reviewing the substantive issue of "consideration" the court concluded that "it simply does not matter which law we apply."[142] Moving on to the facts of *Gottlieb* and the issue of consideration, the court held that the various actions required of the plaintiff in order to participate in the game constituted consideration as a matter of law.[143] The court stated:

> Ms. Gottlieb had to go to the casino to participate in the promotion. She had to wait in line to spin the wheel. By presenting her Diamond Club card to the casino attendant and allowing it to be swiped into the casino's machine, she was

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[138] *Gottlieb*, 109 F. Supp. 2d at 327.

[139] *Id.* at 327.

[140] *Id.* The plaintiff argued that the wheel was spun twice, with the first spin landing on the grand prize, after which the operator swiped her card a second time and spun the wheel a second time, with the second result being nothing more than the prize of two show tickets. *Id.* The casino claims that the "second swipe" never happened, and that the only spin of the wheel resulted in the lesser prize. *Id.* The court's ruling was based upon the defendant's motion for a summary judgment. *Id.* at 327, 332.

[141] *Id.* at 328. The plaintiff was from Pennsylvania, and the defendant casino was located in New Jersey. *Id* at 326-28.

[142] *Id.* at 329. The court quoted from a New Jersey case in which it was noted that in order for something to qualify as a lottery in New Jersey, only minimum consideration was required. *Id.* at 328. "Nor need it be of intrinsic value; 'a rose, a hawk or a peppercorn' will suffice, provided it is what is asked for by the promisor and is not illegal." Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (N.J. 1955) (citing WILLISTON ON CONTRACTS § 100 nn.8, 15 (rev. ed. 1936). The court also cited a Pennsylvania case in which a golfer was promised a valuable prize for hitting a hole in one. *Gottlieb*, 109 F. Supp. 2d at 329 (citing Cobaugh v. Klick-Lewis, 561 A.2d 1248, 1249-50 (Pa. Super. Ct. 1989)). The court held that the golfer who hit the hole in one performed an act that he was under no obligation to perform, which operated as consideration. *Cobaugh*, 561 A.2d at 1250.

[143] *Gottlieb*, 109 F. Supp. 2d at 329.

> permitting the casino to gather information about her gambling habits. Additionally, by participating in the game, she was a part of the entertainment that casinos, by their very nature, are designed to offer to all of those present. All of these detriment[s] to Ms. Gottlieb were "the requested detriments to the promisee induced by the promise" of Tropicana to offer her a chance to win $1 million.[144]

Based upon this analysis, the defendant's motion for a summary judgment was denied, and the case was held over for trial in order to resolve the factual question of whether or not the plaintiff did in fact win the "grand prize" as a result of the spin of the wheel.[145]

## RIGHTS AND OBLIGATIONS OF LICENSED CASINOS

*Card Counters:* The previous case involved the claim that a casino is legally obligated to pay a winning player. In recent years courts have consistently ruled that such gambling related contracts are legally enforceable provided that they were the result of legal activities in a licensed casino.[146] A number of recent cases have addressed other issues dealing with the rights and duties of licensed casinos. One such issue relates to "card counters" at the game of blackjack. It is well known that a skillful blackjack player who can effectively count the cards may in fact have a statistical edge over the house. For this reason, casinos attempt to identify "card counters" and either bar them completely, or take measures designed to eliminate

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[144] *Id.* at 329-30 (citing *Cohen*, 117 A.2d at 495 (alteration in original)).

[145] *Gottlieb*, 109 F. Supp. 2d at 331. The court also rejected the defendant's argument that summary judgment should be granted on the basis of the plaintiff's misrepresentation, fraud and deceit. *Id.* The court ruled that if in fact the plaintiff did win the prize (an issue to be decided at trial) then these claims were without merit. *Id.* However, the court did grant the defendant's motion for a summary judgment with regards to the plaintiff's claim that the casino's action violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law. *Id.* at 332.

[146] For example, in Nevada whenever a licensee and a patron have a dispute as to alleged winnings or losses the Gaming Board will resolve the dispute. The decision of the Board is subject to judicial review. NEV. REV. STAT. 463.362-3668 (2004).

the card counter's advantage over the house. The state of Nevada permits card counters to be barred based upon the notion that a casino is private property, and gambling in this private facility is a privilege and not a right.[147] In the case of *Chen v. State Gaming Control Board*[148] the plaintiff (Chen) was asked for identification by the Monte Carlo casino when he began playing blackjack, whereupon he produced a Burma passport which turned out to be fictitious.[149] After a time the casino identified Chen as a card counter, and he was instructed to cash in his chips and leave the casino.[150] An agent of the Nevada Gaming Control Board was summoned, and he instructed the Monte Carlo to provide Chen with a receipt for the total amount of chips in his possession, pending a criminal investigation.[151] Following the investigation (which resulted in no criminal charges) the agent told the Monte Carlo it could release the full amount to Chen; however, the Monte Carlo returned only the amount of his original buy-in and did not allow him to keep his winnings, which amounted to $40,400.[152] The Gaming Control Board upheld this decision, and Chen brought suit.[153] The district court denied Chen's claim for judicial review, but the Nevada Supreme Court reversed.[154]

The court held that the main issue of the case was whether the plaintiff had committed a fraud on the Monte Carlo.[155] The court stated that:

> To establish fraud, the Monte Carlo must show that Chen provided a false representation of a material fact, which he knew to be false; that Chen intended the Monte Carlo to rely on the representation; that the Monte Carlo detrimentally

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[147] This is true of other states as well, except for New Jersey, as will be discussed shortly.

[148] 994 P.2d 1151 (Nev. 2000).

[149] *Chen*, 994 P.2d at 1152. Plaintiff Chen wished to conceal his identity, as he was afraid of being barred as a card counter.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

> relied on the misrepresentation; and that the misrepresentation proximately caused damages.[156]

The court held that the Monte Carlo failed to prove that it detrimentally relied on Chen's misrepresentations.[157] The court noted that the only reason that the casino asked for identification was to comply with gaming regulations requiring identification for any gambler seeking more than $10,000 in chips.[158] Their purpose was not to help identify card counters, and there was no evidence that casino employees attempted to cross-check the identification produced by Chen with any sources that might identify card counters.[159] In addition, the court held that the proximate cause of Chen winning at blackjack was his skill in playing the game, not his false identification.[160] Hence, there was no proof that Chen's misrepresentation proximately caused the casino's damages.[161] As a result, it was the court's finding that "the Gaming Control Board's determination that Chen committed fraud is contrary to law because the Monte Carlo did not establish all of the elements of fraud."[162]

The dissenting opinion took the position that the Gaming Control Board's decision was not arbitrary, capricious, or contrary to law.[163] Judge Maupin stated that:

> [G]aming establishments have the unquestioned right to protect themselves against so-called "card counters" who have developed expertise in the game of blackjack ("twenty-one"). On the other hand, neither card counting nor the use of a legal subterfuge such as a disguise to gain access to this table game is illegal under Nevada law. I conclude, however, that the misrepresentation here, the use of a fraudulent passport for identification, was not a legal subterfuge and enabled

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[156] *Id.* (citing Lubbe v. Barba, 540 P.2d 115, 117 (Nev. 1975)).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at 1153 (Maupin, J., dissenting).

> appellant access to high stakes play for the purpose of frustrating legitimate attempts by the respondent to prevent this from occurring.[164]

Essentially the dissenting judge felt that the use of false identification was not a "legal" subterfuge, and this was what enabled the player access to high stakes blackjack play.[165] The judge felt that this misrepresentation was specific and material to the caliber of play involved, so that the player should be barred from receiving his winnings.[166]

The state of New Jersey does not permit a casino to bar a player from playing blackjack merely because he or she is a "card counter."[167] As a result, New Jersey casinos have taken a number of "countermeasures" to combat the threat of card counters. These counter measures include such tactics as shuffling the cards earlier than would ordinarily be the case if the casino believes that the remaining cards in the deck are player favorable. Other tactics include limiting card counters to one wager at a time, imposing a lower betting limit than stated on the table, and using "shills" to occupy all seats at a table where the card counter wishes to play. In *Doug Grant, Inc. v. Greate Bay Casino Corp.*[168] a large number of blackjack players sued numerous casinos claiming that these countermeasures were illegal.[169] Specifically, the plaintiffs alleged that the countermeasures constituted racketeering activities under the federal RICO statute.[170] The district court found, and the appellate court agreed, that the primary complaint of the plaintiffs related to early shuffling.[171] Unfortunately for plaintiffs,

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[164] *Id.* (Maupin, J., dissenting).

[165] *Id.* (Maupin, J., dissenting).

[166] *Id.* (Maupin, J., dissenting).

[167] Regulations adopted by the Casino Control Commission have been interpreted by the New Jersey Supreme Court to mean that card counters cannot be barred. *See* Uston v. Resorts Int'l Hotel, 445 A.2d 370, 372-75 (N.J. 1982). New Jersey appears to be the only jurisdiction with this policy.

[168] 232 F.3d 173 (3d Cir. 2000).

[169] *Doug Grant, Inc.*, 232 F.3d at 177-78.

[170] *Id.* at 184; *see* 18 U.S.C. 1964(c) (1995).

[171] *Doug Grant, Inc.*, 232 F.3d at 184.

both the district and appellate courts held that state regulations specifically permitted the casino to shuffle the cards at any time after the conclusion of a round of play.[172] The regulatory body even anticipated that this tactic might be used to combat card counters, and if the reshuffling occurred only in positive point count situations (favoring the player), the casino advantage against all players would increase.[173] Despite the fact that this countermeasure might adversely affect all players, the court held it to be an allowed practice.[174] The court also found that the other countermeasures were explicitly or implicitly permitted by the appropriate regulations.[175] The court noted that while the plaintiffs might take issue with the policies established by the regulatory body, "a casino following it before its invalidation hardly could be subject to RICO liability for that conduct."[176] In the end, the court held that it had "reached the conclusion that appellants' allegations that the casinos or any appellee ha[d] committed predicate RICO acts [were] completely insubstantial and border on the frivolous."[177] Perhaps adding to the frivolity, the plaintiffs also alleged violations of the Equal Protection Clause and the Due Process Clause of the New Jersey Constitution.[178] The court rejected these arguments by simply noting that the casinos were private parties and hence were not subject to constitutional requirements of equal protection and due process.[179] The court indicated that "[s]tate regulation and the CCC's authorization of casino activities do not transform the casinos into state actors."[180] The court also stated that even if the Constitution did apply, under a "rational basis" approach "the countermeasures used by the casinos and authorized by the

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[172] *Id.*
[173] *Id.* at 185.
[174] *Id.*
[175] *Id.* at 185-87.
[176] *Id.* at 185.
[177] *Id.* at 187.
[178] *Id.* at 189.
[179] *Id.*
[180] *Id.*

CCC are rationally related to the legitimate state interest in protecting the financial viability of the casino industry."[181]

In the case of *Ziglin v. Players MH, L.P.*[182] a blackjack player on a Missouri riverboat casino brought suit against the casino when he was barred from playing blackjack at the casino.[183] In this case the player argued that in barring him from playing blackjack, the casino breached a contract which they had with him.[184] He asserted that the casino was making an offer when it advertised its willingness to entertain guests who wished to play blackjack, and that he accepted its offer when he appeared at the casino ready and willing to play.[185] The trial court rendered a summary judgment in favor of the casino, and this was affirmed on appeal.[186] The court noted that in most cases advertisements do not constitute offers, but only invitations to negotiate.[187] The court saw no reason to vary from the general rule in this case, holding that:

> The advertisements were not specific, definite, or certain, and could not reasonably be construed as offers. Rather, the advertisements were merely invitations to make an offer, to enter into negotiations, or to patronize Casino. Because there was no offer, there could be neither an acceptance nor a breach of contract.[188]

The plaintiff also claimed a violation of the Missouri Unlawful Merchandising Act.[189] The court rejected this argument by noting that the Act only applied in circumstances where the consumer purchased or leased something, and merely placing a bet at a game of blackjack did not constitute a purchase or lease.[190] Finally, the player claimed that by not notifying him

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[181] *Id.*
[182] 36 S.W.3d 786 (Mo. Ct. App. 2001).
[183] *Ziglin*, 36 S.W.3d at 788.
[184] *Id.*
[185] *Id.*
[186] *Id.* at 788, 791.
[187] *Id.* at 790 (citing 17A AM. JUR. 2d *Contracts* § 46 (1991)).
[188] *Id.*
[189] *Id.*; *see* MO. REV. STAT. § 407.010 (1994).
[190] *Ziglin*, 36 S.W.3d at 790.

in advance that card counters could be barred, the casino was liable for negligent misrepresentation or for fraudulent misrepresentation.[191] This claim was also rejected.[192] The court stated that "[p]atron failed to demonstrate that Casino had a legal duty to disclose that 'card counters' may be excluded from playing blackjack. While Casino had superior knowledge of its views on 'card counting,' Patron made no showing that he could not discover the information through the use of reasonable means."[193]

*Duty to bar problem gamblers:* There have been a number of cases in which it has been argued that a casino owed damages to a gambler as a result of its failure to eject the gambler from the premises due to his status as a "problem gambler," his obvious intoxication, or his known mental health problems. Recall that in the *Williams* case a federal court dismissed the plaintiff's claim on jurisdictional grounds.[194] In an Iowa case, *Logan v. Ameristar Casino Council Bluffs, Inc.*,[195] the player alleged that he was drinking and gambling excessively at the defendant casino.[196] The plaintiff alleged that his friend explained the situation to the pit boss and begged him to bar plaintiff from the premises.[197] This did not occur, the plaintiff continued to gamble and lose, and the plaintiff claimed that the casino's failure to bar him from the casino was wrongful and caused him substantial harm.[198]

The first basis for the plaintiff's claim was regulatory in nature.[199] The plaintiff pointed out that under regulations is-

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[191] *Id.* at 790-91.

[192] *Id.*

[193] *Id.* at 791.

[194] *See supra* notes 75-83 and accompanying text. The trial court had considered the substantive allegations and dismissed them on summary judgment, stating that "[d]espite his counsel's creative efforts, and regardless of Williams' sympathetic plight, neither federal nor Indiana law provides him any refuge or reward." Williams v. Aztar Ind. Gaming Corp., No. EV 01-75-C-T/H, 2003 U.S. Dist. LEXIS 6450, at *2 (S.D. Ind. Apr. 5, 2003).

[195] 185 F. Supp. 2d 1021 (S.D. Iowa 2002).

[196] *Logan*, 185 F. Supp. at 1022-23.

[197] *Id.* at 1023.

[198] *Id.*

[199] *Id.*

sued by the Iowa Racing and Gaming Commission the holder of a license to operate gambling activities had an obligation to: "(1) [i]dentify problem gamblers; and (2) [p]revent previously identified problem gamblers from gambling at the licensee's facility or other facilities licensed by the state of Iowa."[200] The court rejected this argument by ruling that the regulation did not establish a private cause of action.[201] Quoting from the Iowa Supreme Court, the court stated that "a violation of a statutory duty gives rise to a tort claim only when the statute, explicitly or implicitly, provides for such a cause of action."[202] The court also noted that if the legislature had intended to create a private cause of action, "it would have written the statutes unequivocally to create the tort or authorize such a regulation."[203]

The second basis for the plaintiff's claim related to a common law claim of negligence.[204] The plaintiff argued that the casino had "a common law duty to prevent him from drinking and gambling at its casino."[205] The court rejected this argument also, stating that "[t]he Iowa Supreme Court has never recognized a common law duty in a similar situation. This court refuses to stretch Iowa common law negligence in the manner requested without the slightest indication from Iowa courts suggesting that it would allow such a claim."[206]

The plaintiff's final claim was based upon an alleged breach of the implied covenant of good faith and fair dealing.[207] He argued that a contract was formed each time that he gambled, and therefore, the casino owed him a duty of good faith and fair dealing.[208] The court rejected this argument by holding that this "contract" was not a contract at all due to the

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[200] *Id.* (citing IOWA ADMIN. CODE r. 491-5.4(12) (2001)).

[201] *Logan*, 185 F. Supp. 2d at 1024-25.

[202] *Id.* at 1024 (quoting Sanford v. Manternach, 601 N.W.2d 360, 371 (Iowa 1999)).

[203] *Id.* at 1024-25.

[204] *Id.* at 1025.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

lack of mutual assent.[209] The court cited decisions from other jurisdictions which indicated that "a contract never forms between a casino and a gambler due to the lack of mutuality."[210] The court stated that "the highly regulated nature of the gambling industry drastically reduces the parties' freedom to contract and thereby precludes the mutuality necessary to form a 'gambling contract.'"[211]

The court's resolution of this final claim seems less than satisfying, as it raises the issue of whether basic principles of contract law can ever be used in areas of considerable government regulation. Based upon this precedent, it could be argued that agreements between airlines and passengers do not constitute "contracts" for the reason that the passenger is totally devoid of a "freedom to contract." Perhaps the court would have been better off relying on the gambler's intoxication as the primary reason why there was a lack of mutual assent. Alternatively, the court might have ruled that the casino had no contractual obligation to the player unless and until the subject event (a game of blackjack, a roll of the dice in craps or the spin of the Roulette wheel) had been completed and the player was the winner.

A similar case was decided by a federal court applying Indiana law. In *Merrill v. Trump Indiana, Inc.*,[212] the plaintiff had entered a clinic for compulsive gamblers.[213] Although this fact was disputed, the plaintiff alleged that his guardian/trustee contacted the casino and formed with it an oral contract that plaintiff would be barred from the casino.[214] The plaintiff also sent a letter directly to the casino asking that he be barred.[215] The casino admitted that this letter was re-

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[209] *Id.*

[210] *Id.*

[211] *Id.* at 1026.

[212] 320 F.3d 729 (7th Cir. 2003).

[213] *Merrill*, 320 F.3d at 731.

[214] *Id.* Although the plaintiff alleged that there was an oral contract obligating the casino to bar the plaintiff, the court ruled that discovery clearly indicated that no such oral contract was ever formed. *Id.*

[215] *Id.*

ceived; the plaintiff's name even appeared on the casino's "eviction list."[216] Despite this fact, the plaintiff was allowed to enter the casino and gamble, and the plaintiff brought suit claiming that this was wrongful on the part of the casino.[217] The contractual theory of recovery was abandoned by the plaintiff, and the court's decision dealt solely with tort issues.[218]

The court began by noting that a defendant is not liable for negligence unless a duty of care is owed to the victim.[219] The plaintiff argued that Indiana statutory law and applicable regulations imposed such a duty.[220] The court ruled for the defendant casino on both issues.[221] With regards to statutory law, the court reviewed the Indiana legislation and noted that it gave the Gaming Commission the power to evict gamblers whose activities called into question the honesty and integrity of gambling operations.[222] However, the statute only addressed exclusions by the Gaming Commission, not the casinos.[223] With regards to duties imposed on the casino by gaming regulations, the court stated that Indiana regulations did require a casino to maintain an eviction list and to include at a minimum the names of gamblers who requested to be put on the list, but this regulation went into effect two years after the events leading to the lawsuit.[224] The court further noted that even if the regulation had been in effect this did "not automatically translate into a duty of care owed to compulsive gamblers. At most, the rules impose[d] upon Trump a duty to the state through the gaming commission, not to a self-requesting evict-

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[216] *Id.*

[217] *Id.* At the time of the trial the plaintiff was serving time in federal prison for bank robbery. *Id.* Although it is unclear whether he was claiming that the casino's failure to eject him resulted in his turning to a life of crime, he was claiming damages in the amount of $6 million. *Id.*

[218] *Id.*

[219] *Id.* at 731.

[220] *Id.*

[221] *Id.* at 733.

[222] *Id.* at 731 (citing IND. CODE § 4-33-4-7 (2002)).

[223] *Id.* at 732; *see* IND. CODE § 4-33-4-7 (2002).

[224] *Merrill*, 320 F.3d at 732.

ee."[225] Similar to the court in the Iowa case, the *Merrill* court noted that:

> [N]either the regulations nor the statute expressly creates a private cause of action against nonconforming casinos. When a statute is silent regarding the imposition of civil liability, the Indiana Supreme Court looks to legislative intent to determine whether a private cause of action exists . . . . Given the extent of gambling regulation in Indiana, we conclude that the Indiana Supreme Court would not conclude that the legislature intended to create a private cause of action.[226]

The court also rejected the plaintiff's argument that the casino owed him a duty of care under common law.[227] The court compared the situation to that of a tavern keeper's liability for failure to exercise reasonable care to protect its customers, but stated that "Indiana law does not protect a drunk driver from the effects of his own conduct, and we assume that the Indiana Supreme Court would take a similar approach with compulsive gamblers."[228]

*Machine malfunction:* Two cases from Mississippi involved an allegation by a casino that a slot machine had malfunctioned, with the result that a player who thought that a jackpot had been won in fact was not entitled to the prize. The first case, *Grand Casino Biloxi v. Hallmark*,[229] involved a player who pulled a slot machine lever and saw "Grand Bucks" displayed on the machine's screen.[230] He believed that he had won over $500,000; however, "[c]asino employees arrived at the scene and informed him that the machine had malfunctioned."[231] He requested a representative from the Mississippi Gaming Commission.[232] Before the representative could arrive

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[225] *Id.*

[226] *Id.* (citing Vaughn v. Daniels Co., 777 N.E.2d 1110, 1134 (Ind. 2002); Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291 (3d Cir. 1995)).

[227] *Id.*

[228] *Id.* at 733.

[229] 823 So. 2d 1185 (Miss. 2002).

[230] *Grand Casino Biloxi*, 823 So. 2d at 1186.

[231] *Id.*

[232] *Id.*

casino employees entered the machine, spun the reels and removed them from the machine.[233] As a result, the Gaming Commission representative could not examine the machine as it existed at the time of the alleged winning spin.[234] Also, on the same night, a casino employee recorded over video tape which showed the casino employees running tests on the machine.[235] Fifteen other camera angles were also either erased or recorded over.[236]

The agent for the Commission determined that the machine was in a tilted condition at the time of the "winning" play, and agreed with the casino that the prize had not been won.[237] After an investigation and hearing, the Commission agreed with this finding.[238] In the ensuing litigation, the trial court determined that the player's due process rights were violated as a result of the "destruction of relevant evidence and the Commission's failure to conduct a proper investigation."[239] The supreme court agreed with this ruling and upheld the trial court's reinstatement of the $500,000 grand prize.[240] The following reasons were given by the court:

1. The casino's failure to immediately notify the Commission resulted in a denial of Hallmark's due process rights.[241] The court noted that the casino had a statutory obligation to immediately notify the Commission's executive director in any case involving a dispute with a gambler involving more than $500.[242] It was held that the casino discouraged the player from involving the Commission, and altered the machine before a representative of the Commission could arrive.[243] The conclusion was that "[n]otice to the Commission at this point in

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[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.* at 1195.
[241] *Id.* at 1187-89.
[242] *Id.* at 1187 (citing MISS. CODE ANN. § 75-76-159 (2000)).
[243] *Id.* at 1188.

time afforded no substantive due process protection to [plaintiff.]"[244]

The court did not consider the question of whether the fact that the casino was a private party (rather than a "state actor") exempted it from the constitutional requirement of due process. This was a key component of the analysis in the *Greate Bay Casino* case, in which the court stated that as a private party a casino was not required to afford due process to its customers.[245] This is due to the fact that Mississippi statutory law allows courts to reverse a decision of the Commission if, inter alia, the decision is "in violation of constitutional principles."[246] However, as indicated in the dissenting opinion, there is a question whether these laws require that the casino give its customers due process, or whether the due process requirement is only applicable to the Commission.[247] In addition, the court did not specifically address the issue of whether failure to adhere to statutory and regulatory requirements result in a private right of action. In both *Logan* and *Merrill*, the courts held that no such private right of action had been created.

2. The investigation by the Commission resulted in a denial of the plaintiff's due process rights.[248] The court agreed with the plaintiff's claim that the Commission's investigation was deficient and resulted in a denial of due process.[249] The court pointed to the delay of the Commission's agent in arriving on the scene, the failure of the agent to document conversations with relevant parties and the fact that the machine had been altered prior to his arrival.[250] The conclusion was that "[defendant's] failure to preserve the evidence and the

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[244] *Id.*

[245] Doug Grant, Inc. v. Greate Bay Casino Corp, 232 F.3d 173, 189-90 (3d Cir. 2000).

[246] *See* MISS. CODE. ANN. § 75-76-171(a) (2000). *But see* discussion *infra* notes 258-85.

[247] *Grand Casino Biloxi*, 823 So. 2d at 1196-97 (Smith, P.J., dissenting).

[248] *Id.* at 1191.

[249] *Id.*

[250] *Id.*

Commission's investigative technique, in relying on tainted evidence, contributed to the denial of [plaintiff's] right to due process."[251]

3. The failure of the casino to preserve the evidence prejudiced the plaintiff's rights.[252] The court turned to a gaming regulation requiring the preservation of videotape for at least ten days, and noted that this regulation was violated.[253] However, once again there was no discussion of whether the violation of this regulation should result in a private right of action. The court did cite a well known legal doctrine that "[i]t is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator."[254]

The dissenting opinion vehemently disagreed with the majority on all counts. The justice began by stating that:

> The majority forces a casino to hand over alleged winnings to a gaming patron that were never won, despite overwhelmingly clear evidence of a machine malfunction and not a jackpot. In doing so, the majority epitomizes the catch phrase "jackpot justice," and makes it clear that such ridiculous awards have unfortunately become the price of doing business in this State.[255]

The justice then went on to state that there was no basis for the finding that the patron's due process rights had been violated.[256] He indicated that in his view the Commission representative reported to the scene promptly, and the Commission investigated the matter thoroughly.[257] He further noted that based on *Mississippi Gaming Commission v. Freeman*[258]

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[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.* at 1193 (quoting Tolbert v. State, 511 So. 2d 1368 (Miss. 1987)).
[255] *Id.* 1195 (Smith, P.J., dissenting).
[256] *Id.* (Smith, P.J., dissenting).
[257] *Id.* at 1200-01 (Smith, P.J., dissenting).
[258] 747 So. 2d 231 (Miss. 1999).

the appropriate remedy for a due process violation by the Commission is a disciplinary action, not the awarding of a jackpot that had not been earned.[259] According to the dissenting judge

> we addressed the failure of a casino to notify the Commission in *Freeman*, where we observed that Miss. Code Ann. § 75-76-159(3) mandates that "failure to notify the executive director or patron as provided in subsection (1) is grounds for disciplinary action . . . . We stated that failure to notify does not entitle a patron to jackpot winnings which the evidence shows he or she did not win."[260]

He admitted that the player probably did sincerely believe (at least initially) that he had won a jackpot, but stated that "[i]t is a sad day when this Court awards a jackpot simply because the patron *thought* he won it—truly giving a new meaning to 'jackpot justice.' Decisions like this will have plaintiffs and their lawyers lining up at the courthouse steps."[261]

The dissenting opinion also took issue with the majority's holding that the destruction of the tape was further evidence of the casino's failure to afford the player due process.[262] The dissent pointed out that Mississippi law only required the casino to keep tapes for ten days, and that the Commission did not begin its examination until after ten days had elapsed.[263] At that point the casino was no longer under the statutory obligation to keep the tape, and any delay was the fault of the Commission, not the casino.[264] Furthermore, the video of the actual incident had not been taped over.[265] The only portion that was missing dealt with the events that occurred after the player had claimed to win the grand prize and a casino employee approached the machine to investigate.[266] There was no dis-

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[259] *Grand Casino Biloxi*, 823 So. 2d at 1197 (Smith, P.J., dissenting).
[260] *Id.* at 1200 (Smith, P.J., dissenting) (internal citations omitted).
[261] *Id.* at 1196 (Smith, P.J., dissenting).
[262] *Id.* at 1201 (Smith, P.J., dissenting).
[263] *Id.* at 1201-02 (Smith, P.J., dissenting).
[264] *Id.* at 1202 (Smith, P.J., dissenting).
[265] *Id.* (Smith, P.J., dissenting).
[266] *Id.* (Smith, P.J., dissenting).

pute about what was done by the casino employee in his preliminary investigations, so the missing portion of the tape was not in fact relevant to resolving the case.[267]

The dissenting opinion concluded by stating that the "majority has, for all intents and purposes, successfully renovated the Supreme Court building into a state-sponsored casino; and therefore, I vehemently dissent."[268]

Only three months after the decision in this case, the Mississippi Supreme Court issued a ruling in a case involving similar facts, *Pickle v. IGT*.[269] In this case, the plaintiff was playing a "Wheel of Fortune" progressive slot machine when the machine's wheels stopped on "triple bar-blank-blank," a non-winning combination.[270] However, the bells and whistles went off suggesting a $1,000,000 jackpot hit.[271] A call was placed to the Commission and an agent was dispatched within the hour.[272] Eventually it was determined that the play of the game did not in fact result in a jackpot, but rather the "bells and whistles" had gone off due to a malfunction of the machine.[273] The player was so notified.[274] She appealed to the Gaming Commissioner Hearing Examiner, and after five days of hearings he upheld the initial ruling.[275] This decision was appealed to the Tunica County Circuit Court, which ruled for the Commission, and then to the Mississippi Supreme Court.[276] The appeal contested both the sufficiency of the evidence as well as a claimed violation of due process.[277]

The court began by reviewing its authority under the relevant Mississippi legislation.[278] It noted that the statute per-

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[267] *Id.* (Smith, P.J., dissenting).
[268] *Id.* at 1203 (Smith, P.J., dissenting).
[269] 830 So. 2d 1214 (Miss. 2002).
[270] *Pickle*, 830 So. 2d at 1215.
[271] *Id.*
[272] *Id.* at 1216.
[273] *Id.*
[274] *Id.* at 1218.
[275] *Id.* at 1218-19.
[276] *Id.*
[277] *Id.* at 1220.
[278] *Id.*

mitted the courts to reverse the decision of the Commission if the decision was: "a) [i]n violation of constitutional provisions; b) [i]n excess of the statutory authority or jurisdiction of the commission; c) [m]ade upon unlawful procedure; d) [u]nsupported by any evidence; or e) [a]rbitrary or capricious or otherwise not in accordance with law."[279]

With regards to the weight of the evidence issue, the court emphasized that its authority was limited to determining whether the conclusions of the Commission were "unsupported by any evidence."[280] The court agreed that the reviewing regulatory body had concerns with some actions of the casino (the use of a substandard processor board was noted), but that these were only secondary concerns, and the Commission had no doubt about the actual outcome of the game, which did not produce a winning combination.[281] The court also rejected the plaintiff's claim that the casino had somehow impaired the Commission's opportunity to investigate the occurrence.[282] In summary, the court held that "notwithstanding any alleged violations of gaming regulations, the evidence supported the Hearing Examiner's findings."[283]

The court also rejected the due process claim. The court stated that:

> [Plaintiff] received all of the due process to which she was entitled. She was afforded notice and an opportunity to be heard, since, after all, the hearing was five days long. The facts of this case in no way approach those of *Grand Casino Biloxi v. Hallmark*, in which we awarded a jackpot due to violations of a patron's right to due process. In *Hallmark*, Grand Casino failed to provide notice to the MGC of a patron dispute and destroyed the surveillance tape and custom buffer report rendering the MGC investigation inconclusive and incomplete. In the instant case, a gaming agent was at the

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[279] *Id.* (quoting MISS. CODE ANN. § 75-76-117(3) (2000)).

[280] *Id.* (using language taken directly from the statute). The court declined to use the "substantial evidence standard" suggested by the plaintiff. *Id.*

[281] *Id.* at 1221.

[282] *Id.*

[283] *Id.* at 1222.

> machine within an hour, all surveillance was preserved, and all entries into the machine were monitored. We find no due process violations.[284]

It would appear that the majority in this case is summarizing the factual differences between this case and the *Hallmark* case as follows: in the *Hallmark* case the casino took longer to notify the Commission, altered the machine prior to the arrival of the Commission representative, and erased a portion of the surveillance tape. The dissenting justice in the *Hallmark* case would no doubt point out that in the *Hallmark* case the notification to the Commission was at most one hour later than that which occurred in the *Pickle* case (and probably much less), and the missing portions of the surveillance tape related to activities which occurred several minutes after the game had been completed and the casino employees were summoned to the machine.[285]

*Defamation:* There are few gambling related cases which involve a claim for damages on the basis of defamation, but one such case is *Hampe v. Foote*.[286] In this case Hampe held a gambling license and owned a small gaming establishment.[287] He entered another gaming establishment and won a $4,000 royal flush on a video poker machine.[288] The defendant owners filed a complaint with the Nevada Gaming Commission.[289] They claimed that Hampe illegally arranged for a repairman to work on the video poker machine, and that Hampe was aware that the repairs would increase the odds of winning a jackpot.[290] The Commission eventually dismissed the allegations, and Hampe received his jackpot.[291] However, he brought suit against the defendants claiming that the letter to the Commis-

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[284] *Id.* at 1222-23 (internal citations omitted).

[285] It is interesting to note that the two judges who dissented in *Pickle* sided with the majority in *Hallmark*. Hence, they favored the player in both cases.

[286] 47 P.3d 438 (Nev. 2002).

[287] *Hampe*, 47 P.2d at 439.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

sion constituted defamation of character.[292]

The trial court dismissed the plaintiff's complaint on the basis of its belief that a Nevada statute afforded complainants an absolute privilege.[293] The Nevada Supreme Court affirmed.[294] The statute in question provides:

> 1. Any communication or document of an applicant or licensee, or an affiliate of either, which is made or transmitted to the board or commission or any of their agents or employees to:
>
> . . . .
>
> c) Assist the board or commission in the performance of their respective duties, is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in any civil action.[295]

The plaintiff argued that this privilege did not apply to communications which were fraudulent and malicious, but the court ruled that the legislative intent was clear and provided an absolute privilege regardless of the circumstances.[296] The court stated:

> An absolute privilege bars any civil litigation based on the underlying communications. We have previously explained the policy behind absolute privileges: "In certain situations it is in the public interest that a person speak freely. Where this is so, the law is willing to assume the risk that from time to time the privilege will be abused."[297]

The court concluded by stating that "[r]egardless of the motivation behind the respondent's letter, or any allegedly fraudulent assertions therein, the letter cannot form the basis of any civil liability."[298]

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[292] *Id.*

[293] *Id.*

[294] *Id.* at 440.

[295] NEV. REV. STAT. ANN. 463.3407 (Michie 2004) (quoted in *Hampe*, 47 P.3d at 439).

[296] *Hampe*, 47 P.3d at 439-40.

[297] *Id.*

[298] *Id.* at 440.

INTERNET GAMBLING

The incredible proliferation of internet gambling sites has generated government interest in applying American criminal laws to such activities. However, as the sites in question are invariably run by parties outside of the boundaries of the United States, successful criminal prosecutions have been practically non-existent.[299] One case which did result in a successful prosecution of the site owner is *United States v. Cohen*.[300] In this case the defendant had abandoned his life as a securities trader and developed an internet gambling site situated in Antigua.[301] He targeted an American consumer base, advertising throughout the United States via radio, newspapers and television.[302] Customers would wire at least $300 to open an "account."[303] Bets on sporting events would be placed either by phone or the internet.[304] In one fifteen-month period the firm collected over $5 million in action.[305] The FBI conducted an investigation of this and other offshore bookmaking activities, and in March of 1998 the defendant was arrested and charged with violation of the federal law which prohibits the use of wire communication for the transmission of bets or wagers on sporting events.[306]

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[299] Scott Miller & Christina Binkley, *Trade Body Rules Against U.S. Ban on Web Gambling*, WALL ST. J., Nov. 25, 2004, at A2. Despite the fact that U.S. efforts to suppress internet gambling have been unsuccessful, it has generated complaints from some countries with a vested interest in such activities. *Id.* According to the Wall Street Journal, Antigua and Barbuda brought an action before the World Trade Organization claiming that U.S. laws prohibiting internet gambling violate WTO trade agreements. *Id.* A March 2004 ruling favored the plaintiffs, but the U.S. trade representative rejected the ruling and indicated that the U.S. would appeal. *Id.*

[300] 260 F.3d 68 (2d Cir. 2001).

[301] *Cohen*, 260 F.3d at 70.

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.* at 71.

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting

The defendant was convicted after a ten day jury trial before a federal judge in New York.[307] On appeal the following issues (among others) were raised by the defendant:
*Corrupt motive:* The defendant argued that he sincerely believed that his activities were legal, and hence he should have no criminal responsibility since he lacked a "corrupt motive."[308] This defense derived from an 1875 New York case which held that where an act was only "malum prohibitum" rather than "malum in se," a corrupt motive had to be proved in order for a conspiracy charge to be made.[309] The court rejected this argument, noting that many federal circuits have moved away from the doctrine, and that the American Law Institute expressly rejected the doctrine in its draft of the Model Penal Code.[310] Although the court did not specifically state that it felt that the doctrine was completely dead, it held that whatever might have remained of the policy did not apply to a conspiracy to violate the federal statute at issue in this case.[311]

*Legal Betting:* The defendant attempted to use the "safe harbor" defense of 18 U.S.C. 1084(b) , which states that there is no criminal responsibility "for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign

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> in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 1084 (1994).

[307] *Cohen*, 260 F.3d at 71.

[308] *Id.*

[309] *Id.* at 71-72. *See* People v. Powell, 63 N.Y. 88 (N.Y. 1875). *Powell* involved commissioners of charities who had been convicted of violating state law by purchasing supplies without first advertising for proposals, and awarding a contract to the lowest bidder. *Powell*, 63 N.Y. at 90. The court stated that people do not become conspirators just because they collaborate to do acts which are not inherently evil but which turn out to be illegal. *Id.* at 92.

[310] *Cohen*, 260 F.3d at 72; *see also* MODEL PENAL CODE § 5.03 (1985).

[311] *Cohen*, 260 F.3d at 72.

country in which such betting is legal."[312] The court held that the safe harbor defense was not available to the defendant for the simple reason that betting is illegal in New York[313] "and thus the safe-harbor provision in § 1084(b) cannot not [sic] apply in Cohen's case as a matter of law."[314]

*Transmission of a bet:* The defendant argued that under the system employed by his company the customer placed a deposit with his company, and the company then placed a bet against the account itself.[315] The claim was that since all of these transactions occurred in Antigua where betting was legal, there was no criminal activity in New York.[316] The court dismissed this rather creative argument by holding that the defendants who were physically present in New York were without question placing bets in the state of New York.[317]

*Defendant's mens rea:* The defendant argued that the federal law in question required proof of the "knowing" transmission of bets, and that the judge's instruction to the jury that "ignorance of the law" was no excuse was erroneous.[318] The court quickly dismissed this argument with little discussion, noting that "it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute."[319]

*Rule of Lenity:* The defendant argued that the rule of leni-

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[312] 18 U.S.C. § 1084(b) (1994).

[313] *Cohen*, 260 F.3d at 73. The court cited the New York Constitution. N.Y. CONST. art. I, § 9 ("[N]o . . . bookmaking, or any other kind of gambling shall hereafter be authorized or allowed within this state."). It also cited New York's General Obligations Law. N.Y. GEN. OBLIG. LAW. § 5-401 (McKinney 2001) ("[A]ll wagers, bets or stakes, made to depend on any race or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful.").

[314] *Cohen*, 260 F.3d at 74.

[315] *Id.* at 75.

[316] *Id.* at 74.

[317] *Id.* at 75-76. In support of this conclusion the court quoted from a recorded phone conversation between an undercover FBI agent and the defendant. *Id.* at 75. In the conversation the agent asked "[c]an I place a bet right now?" and the defendant said "[y]ou can place a bet right now." *Id.*

[318] *Id.* at 74.

[319] *Id.* at 76.

ty, a concept associated with due process, required a reversal of his conviction.[320] He claimed that the statute was too unclear to provide him with a fair warning that his actions were illegal.[321] The court held that this doctrine could be applied only in unusual circumstances where there exists a "grievous ambiguity" in a statute.[322] In this case there was no doubt that betting was not permitted in New York, and "it is clear to lawyer and layman alike than an act must be permitted by law in order for it to be legal."[323] Hence, the doctrine clearly did not apply.

It is interesting to note that the defendant would likely never have been prosecuted but for the fact that he returned to the United States.[324] This might be viewed as buttressing his argument that he had a sincere belief that his activities in Antigua did not make him criminally responsible for a violation of United States law.

### Liability under RICO and the Wire Fraud Act

A number of gamblers have brought suit against casinos under the federal RICO law.[325] These claims are invariably dismissed via summary judgment. As previously noted, in the *Williams* case the Seventh Circuit held that a gambler's RICO claim was so frivolous as to result in sanctions under Rule 38. In the case of *Green v. Aztar Corp.*,[326] a gambler asserted that a casino's actions violated RICO.[327] He claimed that the casino placed illegal bets on his behalf, extended him credit to place illegal bets, accepted his checks knowing that he had insufficient funds, offered to forgive his debts if he refused to

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[320] *Id.*

[321] *Id.*

[322] *Id.* (citing Huddleston v. United States, 415 U.S. 814, 831 (1974)).

[323] *Id.* at 77.

[324] There does not appear to be any record of an attempt by the United States to seek extradition of any individual from an independent foreign country for a gambling related offense.

[325] *See* 18 U.S.C. § 1964(c) (1974).

[326] No. 02 C 3514, 2003 U.S. Dist. LEXIS 14699 (N.D. Ill. Aug. 20, 2003).

[327] *Green*, 2003 U.S. Dist. LEXIS 14699, at *3.

cooperate with an FBI investigation, and threatened him and his family.[328] The court summarily dismissed the plaintiff's claims.[329] The judge noted that two requirements had to be met in order for a plaintiff to sue for damages under RICO: 1) the injury must be to the plaintiff's business or property, and not personal; and 2) the acts of the defendant must have proximately resulted in the plaintiff's injury.[330] With regards to the first issue, the court referred to cases decided by the Seventh Circuit which stated that "'injury to business or property' does not include personal injuries such as embarrassment, humiliation, and emotional distress even if those personal injuries resulted in a pecuniary loss."[331] Furthermore, injuries associated with private gambling activities could not be considered an injury to business or property under RICO.[332] The court stated that:

> When Green decided to gamble, he paid for (and received) the opportunity to win. When that chance did not pay off, it did not mean that he suffered a RICO property loss however. Green's disappointment at not winning his bets does not constitute "injury to property" sufficient to confer RICO standing.[333]

The court further held that even if gambling losses could be categorized as losses to business or property, he could not establish that these activities proximately caused him harm.[334] The court stated that "[a]t least two circuits have found that a plaintiff cannot establish proximate cause where the plaintiff voluntarily and knowingly engages in the very RICO activities from which it later claims injury."[335] In sum-

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[328] *Id.*

[329] *Id.* at *4.

[330] *Id.* at *4-5.

[331] *Id.* at *6 (citing Schiffels v. Kemper Fin. Servs., 978 F.2d 344, 353 (7th Cir. 1992).

[332] *Id.* at *4-5.

[333] *Id.* at *6.

[334] *Id.* at *7-8.

[335] *Id.* at *8 (citing *In re* Mastercard Int'l Internet Gambling Litig., 313 F.3d 257 (5th Cir. 2002); Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173

mary, the court stated that "[n]othing in Green's complaint suggests that he was anything but an independent actor who voluntarily chose to gamble away his lottery winnings. Green cannot use RICO to avoid meeting obligations he voluntarily took on."[336]

The RICO laws, as well as the federal Wire Act, were both at issue in a series of class action lawsuits against credit card companies who permitted their cards to be used by gamblers playing on online casinos. The lawsuits were filed in numerous jurisdictions, including Illinois, Alabama, New York, California, and Louisiana. These were consolidated and resolved in the case of *In re Mastercard International, Inc. Internet Gambling Litigation*.[337] The plaintiffs made the claim that the defendant credit card companies had violated a number of federal and state laws, including the federal RICO law.[338] Among other things, the plaintiffs stated that the internet casinos and the defendant credit card companies had engaged in a "worldwide gambling enterprise."[339] The complaint suggested that the credit card companies were directly involved in the illegal activity, and that they "directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering activity and/or collection of unlawful debt."[340] The trial court granted the credit card companies' motion to dismiss.[341] The court began by noting that a valid RICO claim requires that there be proof of a violation of state or federal law and that the offense must be a felony.[342] Upon review of the state laws involved, the trial court concluded that there was no compelling evidence that the credit card companies had violated the laws of any state.[343] With

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(3d Cir. 2000)).

[336] *Green*, 2003 U.S. Dist. 14699, at *8-9.

[337] 132 F. Supp. 2d 468 (E.D. La. 2001), *aff'd* 313 F.3d 257 (5th Cir. 2002).

[338] *In re Mastercard*, 132 F. Supp. 2d at 472.

[339] *Id.* at 475.

[340] Id.

[341] *Id.* at 497.

[342] *Id.* at 487.

[343] *Id.* at 478-79 (analyzing the laws of New Hampshire and Kansas).

regards to the violation of federal law, the court began by reviewing the possible application of the Wire Act.[344] The court noted that this particular law relates to bets placed on a "sporting event or contest" and not to games of chance (such as those which one would encounter in an online casino).[345] The trial court noted that the legislative history to the act supports this conclusion.[346] The judge stated:

> [E]ven a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contests of chance or a future contingent event not under the control or influence of [the bettor] . . . ."[347]

The plaintiffs also alleged violations of the federal Mail and Wire Fraud statutes,[348] but the court stated that "[s]ince the Court finds that the Wire Act does not prohibit internet casino gambling or defendants' association therewith, there can be no mail or wire fraud."[349] Finally, with regards to the allegation of the violation of other federal laws, the court held that its finding that the defendants did not violate the Wire Act made those claims invalid as well.[350]

On appeal the Fifth Circuit Court of Appeals affirmed.[351] The court concurred with the lower court in its holding that there was no proof that the credit card companies had violated any state laws involving the commission of a felony.[352] Responding to the argument that there was a violation of the federal Wire Act, the court stated:

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[344] *Id.* at 479; *see* 18 U.S.C. § 1084 (1994).

[345] *In re Mastercard*, 132 F. Supp. 2d at 480.

[346] *Id.* at 481.

[347] *Id.* at 480 (alteration in original).

[348] *Id.* at 481.

[349] *Id.* at 482.

[350] *Id.* at 482-83.

[351] *In re* Mastercard Int'l Gambling Litig., 313 F.3d 257, 259-60 (5th Cir. 2002).

[352] *In re Mastercard*, 313 F.3d at 264.

> The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling. We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense here.[353]

With regards to the allegation that the defendants had attempted to collect on an unlawful debt, and hence violated that portion of the RICO Act, the Court indicated that in its opinion the defendants had not violated any state or federal gambling law, so that an attempt to collect on that debt could not be a RICO violation.[354] The Wire Act simply "does not prohibit non-sports internet gambling" and any debts resulting from such transactions are not illegal.[355] The court concluded by stating the following:

> [Plaintiffs] simply are not victims under the facts of these cases. Rather, as the district court wrote, "they are independent actors who made a knowing and voluntary choice to engage in a course of conduct. In engaging in this conduct, they got exactly what they bargained for-gambling "chips" with which they could place wagers. They cannot use RICO to avoid meeting obligations they voluntarily took on.[356]

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[353] *Id.* at 262-63.

[354] *Id.* at 263.

[355] *Id.*

[356] *Id.* at 264. The plaintiffs subsequently filed a motion for leave to amend the complaint, to include allegations of violations of, among other things, the National Bank Act and the Truth in Lending Act. Plaintiff's Motion For Leave to Amend Complaint at 5-16, *In re Mastercard*, 313 F.3d 257 (5th Cir. 2002) (No. 00MD-1321 & 00-1322). The judge denied the motion. *Id.* at 18. With regards to the National Bank Act, the plaintiffs pointed out that the Act prohibits a bank from dealing in lottery tickets. *Id.* at 8. The court stated that participation in internet gambling does not constitute a lottery. *Id.* at 10. "The alleged gambling transactions were between two parties, the casino and the bettor, not three or more parties as the statute requires." *Id.*

## Summary and Conclusions

There is every reason to believe that the gambling industry will continue to expand in the twenty-first century. This expansion is likely to be accompanied by increased litigation. The cases cited herein demonstrate that for the most part basic principles of common law have been and will continue to be applied in gambling related transactions. These principles have generally resulted in satisfactory outcomes in most cases. On the other hand, there may be a need for legislative action in certain areas. One is criminal law, where recent cases demonstrate that existing federal criminal statutes might not be adequate to successfully attack such activities as internet gambling, assuming that it is the federal government's intention to suppress such activities. With all of the uncertainty associated with gambling, one prediction can be made with certainty: the number of gambling related cases will continue to increase and will continue to provide judges with interesting and unique challenges long into the future.

# FROM THE CLASSROOM TO THE COURTROOM: THERAPEUTIC JUSTICE AND THE GAMING INDUSTRY'S IMPACT ON LAW

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## I. INTRODUCTION

The past few decades have seen an unprecedented explosion of legalized gambling throughout the United States.[1] Only two states, Hawaii and Utah, still have a total ban on all forms of gambling.[2] In addition, illegal gambling, which is

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[1] *See* R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 567 (2002) ("Though gambling of some sort has appeared in just about every culture throughout recorded history, it only became a gigantic nationwide business in the United States in the last twenty-five years." (footnote omitted)); John Warren Kindt & John K. Palchak, *Legalized Gambling's Destabilization of U.S. Financial Institutions and the Banking Industry: Issues in Bankruptcy, Credit, and Social Norm Production*, 19 BANKR. DEV. J. 21, 24-25 (2002) (discussing the increase in people gambling and the increase in the legalization of gambling during the 1990s); Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 303-04 (1995) (discussing the spread of gambling across America).

[2] *See* A. Gregory Gibbs, Note, *Anchorage: Gaming Capital of the Pacific Rim*, 17 ALASKA L. REV. 343, 345 (2000) (pointing out that the public seems to be "consistent and supportive in their acceptance of legalized gambling"); *see also* ROBERT M. JARVIS ET AL., GAMING LAW: CASES AND MATERIALS 17 (2003) (noting that although there is "outright prohibition" in Hawaii and Utah, there is "unabashed promotion" in Nevada and New Jersey); WILLIAM N. THOMPSON, LEGALIZED GAMBLING 1-4 (2d ed. 1997) (discussing the proliferation of legalized gam-

virtually impossible to regulate or quantify, is believed to be at an all-time high.[3] Whether the burgeoning gaming industry is viewed as a viable solution to economic hardship or the cause of many resulting social ills, it is nevertheless true that "[g]ambling has become a ubiquitous industry."[4] It has infiltrated modern culture, and it is having a significant impact on the legal system.

Because of the historic ties between gambling and organized crime (not to mention the high cash volume transactions), casinos and other betting establishments are highly regulated. That regulation, of course, is unlike regulation of any other American industry. In some cases (usually involving raffles or bingo) the gambling promoter must be a charitable organization. Native Americans run many casinos throughout the nation, and the laws governing the relationship between those tribes and the host states are unique. Horse and dog tracks present their own complications. In Mississippi, as in many other states, the casinos have to float on water. This creates numerous environmental issues as well as some unusual regulations (and tort claims).

Internet gambling is emerging as a new, important (and so-far illegal) industry with its own legal issues. Lotteries also present special problems, since the state essentially runs a for-profit business with potential conflicts of interest abounding.[5] Legal sports betting is currently found only in Nevada, but a recent federal commission found that legal betting in that state has serious ramifications throughout the nation.[6]

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bling throughout North America). In fact, Tennessee just recently joined the ranks of almost forty other states when the legislature created a statewide lottery, per the will of a majority of the people. *See generally* John P. Williams, *Let the Games Begin: Examining the Lottery*, 39 TENN. B.J. 19, Nov. 2003 (detailing the legislation creating the Tennessee Lottery).

[3] One estimate is that Americans bet approximately $1 trillion per year in both legal and illegal gambling. JARVIS, ET AL., *supra* note 2, at 17.

[4] Lori K. Miller & Cathryn L. Claussen, *Online Sports Gambling—Regulation or Prohibition?*, 11 J. LEGAL ASPECTS SPORT 99, 99 (2001).

[5] *See generally* Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11 (1992).

[6] NAT'L GAMBLING IMPACT STUDY COMM'N (NGISC) FINAL REPORT ch. 2, 14-15

Regardless of the form of gambling, as with the rest of life, taxation is an ever-present issue, and the IRS treats gambling income differently than any other form of income. All of these matters have a direct impact on the practice of law in the United States of America.

Legalized gambling and the gaming industry have also had numerous social impacts, most of which have or will have significant ramifications for the American legal system. Most studies suggest that legalized gambling leads to an increase in divorce, bankruptcy, suicide and compulsive gambling. Problem gamblers also face financial and other problems that frequently lead to anti-social behavior. Importantly, the number of crimes committed as a result of compulsive gambling has created new problems for social institutions, especially the courts.[7]

This sudden and dramatic growth in an activity that until recently was considered illegal is having a dramatic impact on the practice of law in the United States. More and more large law firms have specific attorneys, if not whole departments, specializing in gaming law. Many bar associations have sections devoted to gaming law. In at least one recent legal malpractice case, a court considered whether attorneys who specialize in this area should be held to a higher level of expertise.[8] Several law schools now offer courses in gaming and

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(June 1999), *available at* http://govinfo.library.unt.edu/ngisc/fullrpt.html. *See* Ronald J. Rychlak, *A Bad Bet: Federal Criminalization of Nevada's Collegiate Sports Books*, 4 NEV. L.J. 320, 320-21 (2003-04) (discussing the formation and findings of the NGISC).

[7] *See* Justin W. Starr, Note, *Diminished Capacity Departures for Compulsive Gambling: Punishing the Pathological or Pardoning the Common Criminal?*, 2003 BYU L. REV. 385, 394 n.47 (2003) (listing numerous accounts of incidences of crime resulting from compulsive gambling). *See generally* Rychlak, *supra* note 1.

[8] Day v. Dorsey & Whitney, 21 Fed. App. 530 (8th Cir. 2001). In this case, the Eighth Circuit determined that the plaintiffs were sophisticated investors who had not been misled by the defendant law firm. *Day*, 21 Fed. App. at 531. Accordingly, it was not necessary to fully explore this issue. *Id.* "During depositions, however, the plaintiffs had sought detailed information about the firm's practice group, presumably to show that it should be held to a higher standard of care." ROBERT JARVIS ET AL., GAMING LAW: CASES AND MATERIALS: TEACHERS MANUAL 5 (2003).

gambling law, and there are more than a few academic journals that specialize in gambling and gaming issues.[9] Clearly, this is an industry about which legal educators, lawyers and judges must be informed.

## II. THE FIRST GAMBLING TREATMENT COURT

Perhaps the most interesting recent development in terms of gaming law has been the creation of a special court designed specifically to deal with the problems associated with compulsive and pathological gambling.[10] This court was opened in 2003 by Senior Justice Mark Farrell of Amherst, New York. The idea behind the court was that pathological gambling is a disease,[11] and that it is better to seek real solutions to the problems facing compulsive gamblers than merely

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[9] There is currently one gaming law textbook on the market, see JARVIS ET AL., *supra* note 2. In addition, *The Gaming Law Review* and *The Gaming Lawyer* both specialize in gaming law issues, and other law reviews often publish symposia issues focused on gaming law. *See, e.g.*, 4 NEV. L.J. (2003-04).

[10] Sylvia Hsieh, *Gambling Courts: The Next Trend in Specialized Courts*, LAW. WKLY. USA, August 4, 2003, at 15. *See generally Therapeutic Justice Still a Long Shot*, ALBANY TIMES, Jan. 13, 2003 (discussing the creation of the first gambling court) *at* http://www.responsiblegambling.org/articles/Therapeutic_justice_still_a_long_shot.pdf.

[11] In *The Diagnostic and Statistical Manual of Mental Disorders* (DSM), the American Psychiatric Association classifies pathological gambling as a form of mental disorder. PETER COLLINS, GAMBLING AND THE PUBLIC INTEREST 137 (2003). The DSM defines pathological gambling as "persistent and recurrent maladaptive (gambling) behavior that disrupts personal, family or vocational pursuits." *Id.* (quoting AMERICAN PSYCHIATRIC ASSOCIATION, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., 1994)). The DSM lists ten descriptions identifying pathological gamblers; if five of the ten are present in an individual, a diagnosis of pathological gambling is warranted. *Id.* at 137-38. It should be noted that, however, only about three to four percent of the population are deemed "probable or potential compulsive gamblers." Mike Roberts, *The National Gambling Debate: Two Defining Issues*, 18 WHITTIER L. REV. 579, 601-02 (1997). "[C]ompulsive gambling does not seem to be a statistically serious problem in society, although the disease or condition may be especially serious for the individual." *Id.* at 602. Peter Collins claims that people who seek the restriction or prohibition of legalized gaming point to the fact that an increase in legalized gaming leads to an increase in gambling addiction, which should not be encouraged by the government; on the other hand, proponents of legalized gambling argue that, in reality, problem gambling is a minuscule problem when considering the benefits of the gaming industry. COLLINS, *supra* at 130-31.

to mete out punishment without consideration of what may have been the root cause of the crime.[12] In other words, this court put in place the principles of therapeutic jurisprudence.[13]

Therapeutic jurisprudence is a relatively new concept in law,[14] though it is rooted in older legal theories such as "sociological jurisprudence" and "legal realism" that were espoused by the likes of Roscoe Pound[15] and Oliver Wendell Holmes.[16] The therapeutic jurisprudence movement has seen consistent growth in scholarly consideration and critique as well as increasing practical implementation since its beginnings in the last decade of the twentieth century.[17] Though

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[12] *See* I. Nelson Rose, *The World's Only Gambling Court*, *at* http://www.gamblingandthelaw.com/columns/153_gambling_court.htm (last visited Feb. 10, 2004) (noting that none of the graduates of the Gambling Court has "been convicted as a repeat offender").

[13] "Therapeutic jurisprudence" is often synonymously referred to as "therapeutic justice" throughout much of the literature on the subject and is used interchangeably in this paper. Some of the authors quoted herein simply refer to the concept as "TJ."

[14] *See* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 446 (1999) (discussing sociological jurisprudence as a precursor to therapeutic jurisprudence). "The rapid rise of therapeutic jurisprudence . . . heralds the emergence of a new era in the legal profession . . . in which law and legal practice may be more humane, therapeutic, beneficial, humanistic, healing, restorative, curative, collaborative, and comprehensive." Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465 (Dennis P. Stolle et al. eds., 2000) [hereinafter PRACTICING THERAPEUTIC JURISPRUDENCE].

[15] Hora et al., *supra* note 14, at 446. The notion of "sociological jurisprudence" as discussed by Pound is similar in theory to that of therapeutic jurisprudence in that it asserts "that the law must look to the relationship between itself and the social effects it creates." *Id.*

[16] *Id.* "The life of the law has not been logic: it has been experience," is the famous quote of Justice Oliver Wendell Holmes often cited and recited by proponents of therapeutic jurisprudence. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

[17] Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y & L. 93, 193 (1995). Most notably, courts have become very interested in the concept of therapeutic jurisprudence. David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 241. "Fortunately, the movement

scholars have used various terms to explain therapeutic jurisprudence,[18] it is generally defined as "the study of the role of the law as a therapeutic agent."[19]

Therapeutic jurisprudence has been most commonly accepted to mean "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."[20] It has been widely touted as being more responsive to individuals and ultimately saving money on overcrowded prisons.[21] The primary goal of therapeutic justice is to identify the underlying cause of the criminal behavior on an individual basis, to offer the offender treatment and to ensure that the offender is re-

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from theory to practice is now occurring, as therapeutic jurisprudence begins to strike a responsive chord among segments of the judiciary and of the legal profession." David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 46 (footnotes omitted). "[T]he movement of therapeutic jurisprudence from the academic realm to real-world activity is now beginning to occur, especially in the realm of the therapeutic application of the law by trial judges and by attorneys." David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 699 (1999) (emphasis omitted).

[18] *See e.g.*, Dennis P. Stole et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 7 ("Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects."); Hora et al., *supra* note 14, at 444 ("Fundamentally, therapeutic jurisprudence focuses on the 'sociopsychological ways' in which laws and legal processes affect individuals involved in our legal system. . . . [T]herapeutic jurisprudence can illuminate how laws and legal processes may in fact support or undermine the public policy reasons for instituting those laws and legal processes." (footnote omitted)); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373, 380 (2000) (footnote omitted) ("The theory of therapeutic jurisprudence maintains that the law asserts beneficial therapeutic or detrimental antitherapeutic psychological or other consequences upon individuals that are often minimized by the legal community.").

[19] Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence,* 3 PSYCHOL., PUB. POL'Y & L. 184, 185 (1997).

[20] Hora et al., *supra* note 14, at 442-43 n.10 (quoting Slobogin, *supra* note 17, at 193) (emphasis omitted).

[21] Hsieh, *supra* note 10, at 15.

leased from the system having been rehabilitated to some degree so that he or she becomes a better citizen.[22] To achieve these ends, laws are evaluated in conjunction with the relevant aspects of the behavioral and social sciences, and "consistent with considerations of justice and other relevant normative values, [the] law [should] be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones."[23]

In applying therapeutic jurisprudence, "therapeutic" considerations are not necessarily the controlling factors; they must be weighed against other legal and social values and factors.[24] For example, "[w]hen persistent social problems, such as child abuse, domestic violence, drug addiction and parental conflict following divorce, appear on court dockets, therapeutic justice asks whether legal interventions are likely to produce net benefits or burdens for the mental health of litigants."[25] Therapeutic jurisprudence can be applied to various contexts of the law, from criminal law and family law to tort law and commercial law.[26]

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[22] Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 5 (2002).

[23] Dennis P. Stole et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 7.

[24] *See* Hora et al., *supra* note 14, at 445 (comparing the balance of therapeutic considerations to the First Amendment balance of rights).

[25] Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 339 (2003). The therapeutic justice concept does not necessarily seek to reform laws but to inquire as to how existing laws may be applied in the most therapeutic manner so as to broaden the concept to be not only theoretical in nature but also to have practical applications. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, *supra* note 17, at 697.

[26] *See* Dennis P. Stole et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 8 (listing the areas of law to which therapeutic jurisprudence has been applied as "criminal law, family law, juvenile law, disability law, discrimination law, health law, evidence law, tort law, contracts and commercial law, labor arbitration, workers' compensation law, probate law, and legal profession"); *see also* Douglas A. Van Epps, *Therapeutic Justice Adds to Prescriptions for Problems*, DISP. RESOL. MAG., Spring 2000, at 9 ("[T]oday the therapeutic jurisprudence paradigm or construct is being considered

Despite strong academic support for the application of therapeutic jurisprudence,[27] it also has its critics. In order for therapeutic jurisprudence to maximize its potential, the "several conceptual and practical dilemmas" inherent in the idea must be acknowledged.[28] One major criticism of therapeutic jurisprudence is that therapeutic considerations can conflict with other normative values that are antitherapeutic.[29] In

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with respect to virtually every type of problem appearing in court . . . .").

[27] *See* Daicoff, *supra* note 14, at 466-67 (listing similar and/or complimentary legal theories and concepts: "preventive law . . . procedural justice, restorative justice, facilitative mediation, transformative mediation, holistic law, collaborative law, creative problem solving, and specialized courts"). David Wexler wrote, "[T]herapeutic jurisprudence work is now being enriched by the efforts of some to explore intellectual links between it and related approaches—such as procedural justice, restorative justice, the ecology of human development, alternative dispute resolution, and preventive law." Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, *supra* note 17, at 697 (footnotes omitted). For a discussion advocating the integration of therapeutic jurisprudence and preventive law principles, see generally Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997).

[28] Slobogin, *supra* note 17, at 195. Professor Slobogin has identified five conceptual problems with therapeutic jurisprudence:

> (1) It can be so broadly defined and so closely related to other legal theories that it lacks identity and adds no significant value to modern jurisprudence;
> (2) The terms "therapeutic" and "well-being" should be more clearly and specifically defined;
> (3) "Empirical indeterminacy" may result because therapeutic jurisprudence is so dependent on social and behavioral science research;
> (4) The fear that applying therapeutic jurisprudence effectively abandons the rule of law; and
> (5) The problems associated with balancing therapeutic considerations with other substantial factors.

*Id.* at 195-210. Slobogin identifies these as the five dilemmas that question "the viability of therapeutic jurisprudence." *Id.* at 195. In conclusion, Slobogin emphasizes that his critiques are nothing more than suggestions for improvement "needed to goad therapeutic jurisprudence into a critical self-consciousness." *Id.* at 219. In supporting this same proposition, one author states, "The notion of applying the law therapeutically . . . is in desperate need of a facilitating legal structure or context." Stolle & Wexler, *supra* note 27, at 27.

[29] *See* Dennis P. Stole et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 8 (commenting on the criticism that therapeutic jurisprudence is paternalistic); Hora et al., *supra* note

other words, treatment can conflict with the idea of punishment, depriving society of utilitarian benefits.[30] Similarly, some critics contend that therapeutic considerations should not be the province of the judicial system because they are often undeterminable.[31]

Opponents of therapeutic justice often contend that the benefits of such programs do not justify the extraordinary commitment of resources and expenditure of funds that are typically required for such programs.[32] It is certainly true that compulsive gambling is less likely to be the cause of increased crime rates than, for instance, drug addiction. Similarly, because of the relatively small percentage of people who suffer from pathological or compulsive gambling,[33] the amount of resources and money that would have to be expended for therapeutic gambling courts might outweigh the benefits. Finally, gambling addiction is harder to identify than drug addiction,[34] and the causal connection between one's problem with compulsive gambling and his or her crime is likely to be difficult for the court to identify and adjudicate.

## III. THERAPEUTIC JURISPRUDENCE: DRUG TREATMENT COURTS

Despite potential difficulties, the benefits of understanding the interrelationship that inherently exists between social, political and psychological factors and the law are significant.

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14, at 445 (noting that therapeutic justice is not to be used as the "dominant perspective").

[30] *See* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 322-25 (1990) (discussing the utilitarian theory of punishment).

[31] *See* Dennis P. Stole et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 8-9 (listing various critiques of therapeutic jurisprudence).

[32] *See* Carns et al., *supra* note 22, at 17-18 (detailing the costs associated with therapeutic justice). Of course, if the total costs of all the rehabilitative efforts associated with drug treatment courts were compared to the cost of incarceration for a year, the latter would be substantially more costly. *Id.* at 18.

[33] *See supra* note 7 and accompanying text.

[34] Gambling problems are often "masked" behind other problems such as drug or alcohol abuse. Hsieh, *supra* note 10, at 15; Rychlak, *supra* note 5, at 11.

Drug treatment courts are a well-documented example of court-instituted therapeutic jurisprudence,[35] and they provide a framework by which one can analyze this theory in terms of accountability, rehabilitation and outcome-oriented goals.[36]

The 1980s brought about a need for the court system to more effectively handle the numerous cases involving drug-addicted criminal defendants.[37] Under the typical adjudicatory process, the offender would stand trial, be sentenced to jail,

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[35] Problem solving courts most often deal with domestic affairs, mental health concerns or criminal cases involving drugs and/or alcohol. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055-56 (2003). They have been defined as "specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services." *Id.* at 1055. The idea of problem solving courts grew out of the drug treatment court movement. *Id.* at 1062. The practical establishment of these types of courts can best be understood within the theoretical framework of therapeutic jurisprudence. *Id.* Professor Bruce Winick suggests that more and more often, new problems that are socio-psychological in nature are requiring courts to be more than arbiters of disputes and necessitating inquiry into human intricacies. *Id.* at 1055.

[36] In addition to drug treatment courts, unified family courts are also another notable example of a type of therapeutic justice court that has been implemented in various jurisdictions around the country. *See* Schepard & Bozzomo, *supra* note 25, at 334. "A unified family court . . . expands th[e] traditional notion of a family court to encompass a single court that coordinates the work of independent agencies and tribunals, each with some limited role in resolving the problems incident to a family's legal matters." Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring System*, 3 J. HEALTH CARE L. & POL'Y 1, 13-14 (1999). One judge contends that jurisdictions with unified family courts based on concepts of therapeutic, restorative and preventive justice are already better as a result, and future implementation of such courts in other areas will equate to a more just and outcome-oriented system for all involved. Michael A. Town, *The Unified Family Court: Preventive, Therapeutic and Restorative Justice for America's Families*, *at* www.preventivelawyer.org/content/essays/town.htm (last visited Feb. 10, 2005). Though the unified family courts are a model of practical application of preventive law and therapeutic jurisprudence, the drug treatment court model is likely more analogous to gambling treatment courts; therefore, the drug treatment court movement will be discussed in further detail to the exclusion of unified family courts. *See* Carns et al., *supra* note 22, at 6 (noting that even though their intent was to convey the concept of therapeutic jurisprudence more broadly, "much of the available literature and evaluation is associated with drug courts").

[37] *See The Drug Court Movement*, NIJ UPDATE (Nat'l Inst. for Justice, Washington, D.C.), Sept. 1995 (discussing the development and components of a drug court) http://www.ncjrs.org/txtfiles/drgctmov.txt (last visited Feb. 10, 2005).

serve time and eventually be released back to society with an overwhelming propensity to commit more crimes.[38] The drug courts, however, fundamentally revamped this process by focusing on treatment of the offender.[39] The most important matter for the judge in a drug treatment court is to set forth the treatment programs for offenders and hold them responsible for completing the programs.[40]

Drug courts provided the first practical application of therapeutic jurisprudence.[41] These courts attack the problem of drug offenses not as a willful choice to commit morally reprehensible behavior but as a condition requiring the court to apply therapeutic treatments and remedies.[42] One author briefly describes the processes considered in drug treatment courts as follows:

> Problem-solving involved identifying the underlying problem (the addiction) rather than managing only the symptoms (larcenies to obtain money to buy drugs). And it involved engaging the addicted person in a process designed to produce health-based outcomes for both the addicted person and the general public.
>
> In the TJ-oriented court, the judge and collaborative team (lawyers, social workers, prosecutors, health professionals) . . . consider what process is likely to have the most therapeutic effect for both the individual in the judicial system and the general public.[43]

Although most drug treatment courts are "unified drug courts," meaning that one judge in one court adjudicates all persons who have been deemed eligible for the treatment pro-

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[38] Van Epps, *supra* note 26, at 9.

[39] *See The Drug Court Movement, supra* note 37 (discussing the bringing of treatment into the court system).

[40] *Id.*

[41] Hora et al., *supra* note 14, at 448; Winick, *supra* note 35, at 1062.

[42] Hora et al., *supra* note 14, at 463. "DTCs view drug offenders through a different lens than the standard court system. . . . [T]raditional criminal jurisprudence methods do not take into account the cases of a drug addicted defendant's behavior when adjudicating drug cases." *Id.* at 463-64.

[43] Van Epps, *supra* note 26, at 9-10.

gram, some courts with a smaller drug-related caseload will just merely hold drug treatment court sessions.[44] While such sessions are being held, the court is guided by principles of therapeutic jurisprudence; thus, one court may function as both a traditional court and as a drug treatment court.[45]

By 2000, there were approximately 325 drug treatment courts in the United States,[46] and these courts are generally considered to have been successful in curbing recidivism.[47] In fact, both the Conference of State Court Administrators and the American Bar Association have applauded the successes of drug treatment courts and therapeutic justice as a whole.[48] Supporters of the drug treatment court movement not only assert that recidivism is low, but they also suggest that the number of incarcerated persons has decreased and court dock-

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[44] *See* Hora et al., *supra* note 14, at 471 (noting the once-weekly session held in the Kalamazoo, Michigan drug treatment court).

[45] *Id.*

[46] Van Epps, *supra* note 26, at 10. Drug court programs may receive federal funding through the United States Department of Justice Office of Drug Court Programs if they meet ten components including drug abuse treatment, drug testing of program participants and collaboration with other service organizations. Carns et al., *supra* note 22, at 8. The criteria set forth by the federal government includes the following ten "key components":

> (1) the integration of substance abuse treatment with justice system case processing; (2) use of a non-adversarial approach where the prosecution and defense promote public safety while protecting the right of the accused to due process; (3) early identification and prompt placement of eligible participants; (4) access to a continuum of treatment, rehabilitation, and related services; (5) frequent testing for alcohol and illicit drugs; (6) a coordinated strategy among judge, prosecution, defense and treatment providers to govern offender compliance; (7) ongoing judicial interaction with each participant; (8) monitoring and evaluation to measure achievement of program goals and gauge effectiveness; (9) continuing interdisciplinary education to promote effective planning, implementation and operation; and (10) partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.

*Id.*

[47] Carns, *supra* note 22, at 8. *But cf. id.* at 16-17 ("[A] few projects have not been able to demonstrate that the drug court population fared any better in terms of post-program recidivism rates than the control or comparison groups."

[48] *See id.* at 9-10 (discussing the "human and political success of therapeutic justice").

ets have been minimized—amounting to heightened efficiency and financial savings throughout the entire system.[49] The drug treatment courts, with jurisprudential underpinnings associated with therapeutic jurisprudence, provide a structural framework for the implementation of other "problem solving courts" to combat various social problems, particularly gambling treatment courts.

## IV. GAMBLING COURTS

The medical profession has recognized compulsive and pathological gambling as an illness for over two decades,[50] but the judicial system has been reluctant to accept that conclusion.[51] Senior Justice Mark Farrell of Amherst, New York decided to create his gambling court, and he modeled it after other specialty courts that had been created to deal with domestic violence offenders and drug offenders.[52] These new gambling courts incorporate many concepts of therapeutic justice, and the primary goal is to ensure that "treatment is a mandated part of sentencing and . . . prosecutors, defense lawyers, and health care professionals cooperate to that end."[53]

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[49] *See* Kondo, *supra* note 18, at 401 (noting that independent investigation of these claims is required). In much the same manner as this paper aspires to do with specialty gambling treatment courts, Kondo's article advocates the creation of mental health specialty courts based on the models of drug treatment courts and specialty family courts. *See generally id.* at 397-422.

[50] The American Psychiatric Association officially acknowledged pathological gambling to be a "mental disorder" in 1980. Hsieh, *supra* note 10, at 15.

[51] Ronald J. Rychlak & Julie Jarrell, *Compulsive Gambling as a Criminal Defense*, 4 GAMING L. REV. 333 (2000). In one recent case, however, a federal court in New York found that pathological gambling qualified as "diminished mental capacity" for the purposes of reducing sentencing for a defendant who was a compulsive gambler. United States v. Liu, 267 F. Supp. 2d 371, 375 (E.D.N.Y. 2003).

[52] Rose, *supra* note 12. Rose further states, "The law does not punish people for being ill." *Id.* The idea of drug treatment courts is a relatively new one that seeks to provide drug and alcohol treatment for those who come through the criminal justice system as well as expedite the unprecedented number of cases coming through the courts involving drug abuse. Hora, *supra* note 14, at 448-49. The first drug court was started in 1989 by a Florida judge with the intent to "systematically bring[] drug treatment to the criminal justice population entering the court system." *The Drug Court Movement, supra* note 37.

[53] Robert L. Stenander, *You Bet Your Life*, GPSOLO, Jan.-Feb. 2004, at 51.

The therapeutic program established for compulsive gamblers who have committed crimes requires defendants to plead guilty and give up all rights to plea-bargain.[54] Essentially, if the defendants successfully complete the program, all criminal charges are dropped; however, if they do not comply with the gambling court's orders, they can be sent back to the criminal court and charged with a felony.[55] This is designed to "get at the problem" of compulsive gambling.[56] The court has piqued the interest of many jurists across the country,[57] and Judge Farrell has traveled widely to discuss implementation of similar courts in other states.[58]

Despite the excitement that therapeutic jurisprudence has generated in other circles, there is surprisingly little academic literature discussing the application of therapeutic jurisprudence or preventive law principles to the problem of pathological and compulsive gambling. It is, however, an area that calls out for more study.

Just as the conventional court system has been unable to successfully deal with drug-addicted criminal defendants,[59] it also has largely failed to deal with compulsive gambling as a social problem.[60] Therapeutic jurisprudence has been written about and applied to a plethora of various social problems over the past decade; however, compulsive gambling has been absent from this group for too long. Compulsive gambling is now more of an important social ill and mental disorder than ever before.[61] The time is ripe for application of therapeutic juris-

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"[Mark] Farrell is a pioneer in therapeutic justice, which focuses on accountability while addressing the underlying illnesses such as alcohol, drug and gambling addiction." *Therapeutic Justice Still a Long Shot*, *supra* note 10.

[54] Hsieh, *supra* note 10, at 15; Rose, *supra* note 12.

[55] Hsieh, *supra* note 10, at 15; Rose, *supra* note 12.

[56] Rose, *supra* note 12.

[57] Judges in California, Florida, Illinois, Indiana, Kentucky, Louisiana, Oregon and Pennsylvania have expressed interest in starting up gambling courts. *See* Hsieh, *supra* note 10, at 15.

[58] *Id.*; Rose, *supra* note 12.

[59] *See* Hora et al., *supra* note 14, at 535 (noting that courts "have, until recently, been ill-equipped to deal with the problem of drug-addicted defendants").

[60] *See supra* note 51 and accompanying text.

[61] *See supra* note 7 and accompanying text.

prudence to compulsive gambling problems.

Gambling treatment courts can and should be tested to see whether they can provide effective treatment to defendants who have been charged with embezzlement, theft and other related crimes.[62] Whether the goal of gambling treatment courts will be achieved can only be determined after they are put in place and tried. The promise of these courts, however, including a lower rate of recidivism and ongoing efforts to combat the social ill of compulsive gambling, justifies the cost of experimenting with therapeutic gambling programs in those jurisdictions that have widespread legalized gambling.

## V. CONCLUSION

Because gambling is increasing in our society, the court system cannot ignore the medically-recognized mental disorder of pathological gambling that is likely the root cause of a number of crimes and other social ills. Therapeutic jurisprudence can be an important way for society to look at these problems. Incarcerating compulsive gamblers without recognition or identification of their problems does not help the criminal, the court system or society as a whole.

The already-established drug courts throughout the nation and the gambling court in New York can serve as models for future gambling courts. Widespread establishment of gambling treatment courts may not yet be obtainable or even necessary, but those states with high concentrations of gambling should consider such programs. Moreover, if a lack of funds or a low case load of gambling-related cases leads to the conclusion that a full-blown specialty gambling court is not warranted, therapeutic jurisprudence principles should be adopted and applied to provide treatment and rehabilitation to compulsive gamblers within the traditional court. Compulsive gambling is a problem that has been identified and therapeutic jurisprudence and gambling treatment courts provide a possible solution that, at

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[62] *See* Starr, *supra* note 7, at 391 n.37 (providing actual examples of cases in which crimes were committed to further a gambling addiction).

the very least, should be given a chance.[63]

[63] The gaming industry should applaud and support the efforts of gaming treatment courts because such courts recognize, identify and assist compulsive gamblers, thereby potentially avoiding more serious complications for the industry. In many ways, such courts provide a service to the industry by bearing the burden of identifying problem gamblers and assisting them in their treatment.

# THE CLASS II GAMING DEBATE: THE JOHNSON ACT VS. THE INDIAN GAMING REGULATORY ACT

*Heidi McNeil Staudenmaier*[*]
*Andrew D. Lynch*[**]

## I. Introduction

This article seeks to accomplish three objectives. First, the issues relative to Class II gaming are analyzed to demonstrate the importance of, and incentive for, Class II gaming. Second, a historical background of relevant statutes, regulations and case law is provided to facilitate understanding of the basic issues involved in Class II gaming. Finally, this article explores the future of Class II gaming, in light of current trends.

## II. Executive Summary

Pursuant to the Indian Gaming Regulatory Act (IGRA), Class II gaming consists of bingo and related games, including pull-tabs, lotto, punch boards, tip jars, instant bingo and non-banked card games.[1] The IGRA permits Class II games to

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[1] *See* 25 U.S.C. § 2703(7)(A)(i) (2000).

utilize "electronic, computer or other technologic aids."[2] Class II gaming is regulated by the tribe and the National Indian Gaming Commission (NIGC). As a general matter, the state where the tribal casino is located has no jurisdiction over Class II gaming.[3] In contrast, a state does have authority to regulate Class III gaming (typically referred to as "casino-style gambling") pursuant to a contract negotiated with the tribe (called a "Tribal-State Compact").[4]

There are several reasons why tribes in certain states have considerable incentive to operate Class II gaming devices in their casinos. One very obvious reason is that the revenue generated by Class II gaming is not typically included in revenue sharing with the state, while Class III gaming revenue is included in any revenue sharing agreement pursuant to a Class III Tribal-State Compact. Likewise, the states are similarly motivated to challenge the classification of these games and contend that the games are, in fact, Class III games and therefore can only be operated pursuant to a Tribal-State Compact.

As a result of these conflicting positions, there have been several reported case decisions over the past few years ruling on whether certain gaming devices were Class II or Class III gaming devices. The NIGC also issues game classification opinions where the NIGC evaluates the game elements and then determines whether the game is an "electronic or technologic aid" to the play of a Class II game.

There is no "bright line test" as to what constitutes a Class II gaming device, or as to what constitutes a Class III gaming device. With technology rapidly evolving, the distinction between the two is becoming more and more blurred. Each new Class II gaming device developed and manufactured for sale to the tribal casinos must be evaluated on a case-by-case basis.

The NIGC (in its 2003 advisory opinions)[5] and the courts

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[2] *Id.*

[3] *See id.* §§ 2703(7), 2710(b)(1).

[4] *Id.* § 2710(d)(3), (6).

[5] *See* Reel Time Bingo Advisory Opinion, NIGC, *at* http://www.nigc.gov/nigc/

have adopted a "plain language" approach to defining Class II games. Under this approach, if the base game being played as part of the machine falls within the Class II category (*i.e.*, bingo or pull-tabs), then there is a better chance that "slot machine" type enhancements such as video screens and other electronic displays will be viewed as permissible electronic or technologic aids to playing the game. The critical analysis then lies in convincing the NIGC or the Court that the base game does fall within the Class II category. The NIGC regulations provide some guidance as to what constitutes bingo, and games related to bingo, such as pull-tabs.[6]

Before a tribal casino will agree to utilize a new gaming device touted as Class II, the casino usually will require an opinion from the manufacturer/seller/distributor concluding that the device falls within the Class II category. To obtain further assurances, the tribe also may seek an advisory opinion from the NIGC (or require the vendor to do so). The NIGC classification opinions are advisory only in nature and not binding upon a court of law. In an effort to clarify this murky area of gaming law, the NIGC is currently working to develop comprehensive technical standards for Class II gaming devices.[7] The NIGC hopes to publish a Final Rule by July of 2005.[8]

Representing a gaming device to be Class II, that is later determined to be Class III either by a court of law or the NIGC, can have adverse consequences for both the tribal casino and the manufacturer/seller/distributor. This is particularly true if the state where the tribal casino is located does not

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documents/opinions/reeltimebingo.jsp (Sept. 23, 2003); *see also* Sierra Design Group "Mystery Bingo" Game Classification Advisory Opinion, NIGC, *at* http://www.nigc.gov/nigc/documents/opinions/mystery bingoopinion.jsp (Sept. 26, 2003).

[6] *See* Definitions: Class II Gaming, 25 C.F.R. § 502.3 (2004); Definitions: Electronic, Computer or Other Technologic Aid, 25 C.F.R. § 502.7 (2004); Definitions: Electronic or Electromechanical Facsimilie, 25 C.F.R. § 502.8 (2004).

[7] Press Release, National Indian Gaming Commission, National Indian Gaming Commission Selects Class II Game Classification Standards Advisory Committee Members (March 8, 2004) (on file with author).

[8] *See* NIGC Timeline (on file with the author).

permit any Class III gaming devices pursuant to a Tribal-State Compact (such as Florida or Oklahoma). Operating Class III gaming devices without a compact equates to being engaged in illegal gaming.

Sometimes the tribal casino is willing to press its sovereignty status and may seek to proceed forward with a machine that may be questionable as to its classification. In this instance, the NIGC or other officials may take actions to require the tribal casino to "cease and desist" in operating the games. If the cease and desist efforts are successful, the tribal casino will likely have to remove the offending games and also could be faced with monetary sanctions or shutdown of the entire casino by the NIGC for non-compliance.

At present, Class II gaming seems to be booming. It provides an enormous "opportunity for [both] Native American gaming as well as the slot [machine] manufacturers who are participating in [this part of the gaming industry]."[9] As a result, "[m]ore and more people are starting to [give Class II gaming a second look]."[10] For some, Class II gaming is "starting to make a lot more sense."[11]

## III. Statutory and Regulatory Overview

### *A. The Johnson Act*

The Johnson Act, as amended in 1962, makes criminal, both outside and inside "Indian Country," the possession, use, sale or transportation of any "gambling device."[12] The Johnson Act defines a "gambling device" as "any so called 'slot machine'" or

> any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and

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[9] *See* Marian Green, *In a Class by Itself: Class II Gaming Poised for Growth, But Some Legal Questions Remain*, Int'l Gaming & Wagering Bus., March 2004, at 1, 36 (quoting Marc Falcone, gaming analyst with Deutsche Bank).

[10] *Id.* at 36 (quoting Charles Lombardo, senior vice president of gaming operations for the Seminole Indians' tribal casinos in Florida).

[11] *Id.*

[12] 15 U.S.C. § 1175(a) (2000).

> manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property . . . .[13]

Some courts have construed the Johnson Act broadly, concluding that the statute's "gambling device" language was enacted to "anticipate the ingeniousness of gambling machine designers" in "separating the public from its money on a large scale."[14] Therefore, the Johnson Act may be interpreted as covering a wide variety of machines.

### *B. The IGRA*

As a result of the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*,[15] which "authorized gaming on federally recognized Indian lands," "Congress enacted the Indian Gaming Regulatory Act . . . , also known as IGRA . . . ."[16] The IGRA "provides a comprehensive regulatory framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government."[17]

IGRA divides Native American gaming into three mutually exclusive categories: Class I, II, and III.[18] The three classes differ as to the extent of federal, tribal, and state oversight."[19]

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[13] *Id.* § 1171(a)(1)-(2).

[14] Lion Mfg. Corp. v. Kennedy, 330 F.2d 833, 837 (D.C. Cir. 1964).

[15] 480 U.S. 202 (1987).

[16] United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 717 (10th Cir. 2000) (interal citations omitted).

[17] Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 (10th Cir. 1997) (internal quotations omitted).

[18] 25 U.S.C. §§ 2703(6), (7)(A), (8).

[19] United States Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170, 1177 (10th Cir. 1991).

### 1. Class I

Class I gaming includes traditional Native American "social games . . . played in connection with, tribal ceremonies or celebrations."[20] Tribes possess "exclusive jurisdiction" to regulate Class I gaming.[21]

### 2. Class II

Class II gaming includes "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . ."[22] The IGRA excludes from the definition of Class II gaming "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."[23] Class II gaming may be conducted in Indian country without a Tribal-State Compact.[24]

Class II games are regulated by both the NIGC and the Tribes.[25] Congress made no reference in IGRA to the relationship between the Johnson Act's strictures and IGRA's authorization of the use of technologic aids to Class II gaming.[26] Nor has Congress amended the Johnson Act to clarify this relationship.[27]

### 3. Class III

Class III is a "residual" category. Under IGRA, all gaming activity other than Class I and II gaming is Class III gaming.[28] Examples of Class III gaming include "any banking card

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[20] 25 U.S.C. § 2703(6).
[21] *Keetoowah*, 927 F.2d at 1177 (quoting 25 U.S.C. § 2710(a)(1)).
[22] 25 U.S.C. § 2703(7)(A).
[23] *Id.* § 2703(7)(B)(ii).
[24] *See id.* §§ 2703(7), 2710(b)(1).
[25] 25 U.S.C. § 2710(b)(2).
[26] *See id.* §§ 2701-21.
[27] *See* 15 U.S.C. §§ 1171-78 (2000).
[28] 25 U.S.C. § 2703(8).

games, including baccarat, chemin de fer, or blackjack [and] electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."[29]

IGRA provides that the Johnson Act's prohibitions "shall not apply to any gaming conducted under a Tribal-State Compact" that is entered into between "any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted" in "a State in which gambling devices are legal."[30]

Class III gaming authorized by a Tribal-State Compact is regulated by the given compact.[31] However, Class III gaming not duly authorized by a compact may be subject to federal criminal prosecution under the Johnson Act.[32] Thus, regulation of Class III gaming is shared by the tribes, the states, the NIGC, and the Department of Justice.

### 4. Specific Definitions

The IGRA defines Class II gaming in relevant part to include:

> i. the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . .[33]

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[29] *Id.* § 2703(7)(B)(i)-(ii).
[30] *Id.* § 2710(d)(3), (6).
[31] *Id.* § 2710(d)(2)(c).
[32] *See* 25 U.S.C. § 2710(d)(6)(a); 15 U.S.C. §§ 1175(a), 1176.
[33] 25 U.S.C. § 2703(7)(A).

Games that are not in the definition of Class I or II games are Class III.[34]

The NIGC regulations (which were amended in 2002) similarly define Class II gaming to include:

> (a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
> (1) Play for prizes with cards bearing numbers or other designations;
> (2) Cover numbers or designations when object[s], similarly numbered or designated, are drawn or electronically determined; and
> (3) Win the game by being the first person to cover a designated pattern on such card.
> (b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo . . . .[35]

In addition to meeting the requirements for bingo, a game can be Class II so long as it includes an electronic aid, which cannot be an electronic or electromechanical facsimile.[36] The NIGC regulations define an electronic, computer or other technologic aid as:

> (a) *Electronic, computer or other technologic aid* means any machine or device that:
> (1) Assists a player or the playing of a game;
> (2) Is not an electronic or electromechanical facsimile; and
> (3) Is operated in accordance with applicable Federal communications law.
> (b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
> (1) Broaden the participation levels in a common game;
> (2) Facilitate communication between and among gaming sites; or
> (3) Allow a player to play a game with or against other players rather than with or against a machine.

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[34] *See* 25 U.S.C. § 2703(8).
[35] 25 C.F.R. § 502.3.
[36] 25 C.F.R. § 502.7(a)(2), (c).

> (c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.[37]

The NIGC regulations define electronic or electromechanical facsimile as:

> *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.[38]

In sum, if a game contains the fundamental characteristics of a Class II game and is played using an electronic or other technologic device, the determining factor in its classification is whether the electronic device is an "aid" to the play of a game, in which case the game is Class II, or whether the electronic device is a "facsimile" of a game, in which case the game is Class III.[39] Arguably, classification could also depend on whether the game is being played in "real time."[40]

> Briefly, what's most important in classifying an electronic gaming machine is whether or not that game is played in real time. "Real time" means that numbers or cards are drawn as the game progresses with players competing against each other, not the house. Games operating in this manner fall under Class II. If the game is already played inside a machine or computer before the player even puts down his or her

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[37] 25 C.F.R. § 502.7.

[38] 25 C.F.R. § 502.8.

[39] *See* 25 C.F.R. §§ 502.7, 502.8.

[40] Tom Wanamaker, *Let the Games Begin: Solving Gaming Problems in Oklahoma?*, INDIAN COUNTRY TODAY, March 3, 2004, *available at* http://www.indiancountry.com/content.cfm?id=1078346685.

wager, we're talking Class III.[41]

As noted above, a game's classification matters in that, under IGRA, Class III games may be played only pursuant to a Tribal-State Compact.[42]

### 5. NIGC Amendments

On July 17, 2002, the NIGC issued a rule amending three key terms of the IGRA with respect to Class II gaming; specifically, "electronic, computer or other technologic aid," "electronic or electromechanical facsimile" and "game similar to bingo."[43] The NIGC issued these amendments to "bring stability and predictability to the important task of game classification."[44]

> Because of the varying levels of tribal, state, and federal involvement in the three classes of gaming, the proper classification of games is essential. As a legal matter, Congress defined the parameters for game classification when it enacted IGRA. As a practical matter, however, several key terms were not specifically defined, and thus subject to more than one interpretation.
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> A recurring question as to the proper scope of class II gaming involves the use of electronics and other technology in conjunction with bingo and other class II games. In IGRA, Congress recognized the right of tribes to use "electronic, computer or other technologic aids" in connection with class II gaming. Congress provided, however, that "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" constitute class III gaming. Since class III gaming requires an approved tribal-state compact to be lawful . . . definitions articulating the proper distinctions between the two classes are vital to sound execution of the law.[45]

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[41] *Id.*

[42] *See* 25 U.S.C. § 2710(d)(1)(C).

[43] *See* Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166, 41166 (June 17, 2002) (to be codified at 25 C.F.R. pt. 502).

[44] *Id.*

[45] *Id.* at 41166-67.

Under a plain language definition of these terms, the distinction between an electronic "aid" to a class II game and a class III "electromechanical facsimile" of a game of chance is relatively ascertainable. However, the [NIGC] did not apply a plain meaning approach in its early construction of IGRA or in its regulatory definitions, and even if it had, the terms can nonetheless be read to overlap.

The distinction between class II "electronic aids" and class III "electromechanical facsimiles" is further complicated by the extent to which class II gaming is affected by the [Johnson Act].

. . . .

The traditional broad construction of the Johnson Act encompasses numerous devices manufactured to assist in the play of class II games that the [NIGC] now believes Congress presumed to constitute acceptable technologic aids. In a [frequently] quoted passage from the legislative history, a Senate Report accompanying the bill that became IGRA indicated that "tribes should be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.

In other words, the ingenuity of gaming designers, which was intended to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of class II gaming.[46]

. . . .

. . . [T]he inconsistencies in purpose between IGRA and the Johnson Act are readily apparent. The federal courts, including no less than three United States circuit courts of appeal [prior to the 2002 NIGC amendments], have been virtually unanimous in concluding that the [NIGC's] definitions [were] not useful in distinguishing between technologic aids and facsimiles. Rather than apply the [NIGC's] rules, the courts instead conducted a plain meaning analysis juxtaposed against the language of the statute and the Senate Report. While most [of the courts] simply ignored the [NIGC's] definitions, one court [intentionally] criticized the [NIGC's] rule as

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[46] *Id.* at 41168 (quoting S. Rep. No. 100-446, at 9 (1988)).

> unhelpful.[47] . . . In sum, these courts implicitly rejected the [NIGC's] definition of "electromechanical facsimile," which incorporates the Johnson Act, and instead used a plain meaning approach to interpret this key term.
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> In addition to the lack of deference noted above, two United States circuit courts reached decisions that can be construed to be at odds with the NIGC's definition of facsimile . . . .[48]

As a result of the NIGC amendments of 2002, bingo and games "similar to bingo" (including non-banked house games) are now allowed to be played in virtually any form, so long as the player is not playing against the house.[49] Some observers contend that the NIGC amendments have essentially authorized tribes to have unlimited numbers of bingo slot machines and have described the tribal gaming operations as "bingosinos."[50] Notwithstanding the "loosening" of the definitions, the classification of Class II gaming devices remains unclear and subject to considerable scrutiny from state officials, state and federal regulators, as well as opponents of tribal gaming.

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[47] Diamond Game Enters. v. Reno, 230 F.3d 365, 369 (D.C. Cir. 2000) ("Boiled down to their essence, the regulations tell us little more than that a Class II aid is something that is not a Class III facsimile."); Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n, 14 F.3d 633, 635 (D.C. Cir. 1994) (holding that the gaming determination at issue in the case could be made by looking to the statute alone and without examining the commission's regulatory definitions); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) (resorting to the dictionary definition of facsimile as "an exact and detailed copy of something," rather than using the regulatory definition).

[48] Definitions: Electronic, Computer, or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, at 41168 (internal citations omitted). United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000). *See* United States v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000).

[49] *See* I. Nelson Rose, *Is It Bingo, or a Slot Machine?*, CASINO CITY TIMES, Oct. 14, 2003, *available at* http://rose.casinocitytimes.com/articles/7264.htm.

[50] *Id.*

## IV. Applicable Case Law

### A. Court Cases

Since 2000, there have been five circuit court decisions where gaming devices were evaluated and determined to be Class II.[51] These cases led, in part, to the NIGC's amendment of the Class II definitions in 2002, and the adoption of a more plain meaning approach.[52] These cases are summarized below.

#### 1. *United States v. 103 Electronic Gambling Devices*

This case involved an *in rem* civil forfeiture action brought by the United States concerning certain "MegaMania" gaming devices manufactured by Multimedia.[53] The United States argued that the devices were illegal gambling devices under the Johnson Act.[54] The Tribe countered that the devices were Class II bingo games permitted under the IGRA.[55] In affirming the lower court decision, the Ninth Circuit court of Appeals held that gaming devices were "technologic aids" used in connection with a bingo game and therefore were permitted Class II devices under IGRA and not prohibited by the Johnson Act.[56] The court determined that the device was simply an aid to the play of a class II game (i.e., bingo).[57]

#### 2. *United States v. 162 MegaMania Gambling Devices*

The same MegaMania games at issue in the Ninth Circuit case were likewise under scrutiny in this Tenth Circuit decision, decided just two months later with similar results.[58] The

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[51] *See* Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, at 41169-70.

[52] *Id.* at 41170.

[53] United States v. 103 Elec. Gaming Devices, 223 F.3d 1091, 1093 (9th Cir. 2000).

[54] *103 Elec. Gaming Devices*, 223 F.3d at 1093.

[55] *Id.*

[56] *Id.* at 1102.

[57] *Id.*

[58] United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 719-20 (10th Cir. 2000).

Tenth Circuit's reasoning concerning the use of the machines in the Oklahoma tribal gaming operations mirrored that of the Ninth Circuit.[59] The decision again hinged on the fact that the analysis is whether the underlying game fits within the definition of a Class II game.[60] If so, then the use of an electronic aid with the game will not convert it into a Class III game.[61]

### 3. *Diamond Game Enterprises v. Reno*

At issue here was a gaming device known as the Lucky Tab II, an electromechanical device that dispensed paper pull-tabs and then displayed their contents on a video monitor.[62] The lower court ruled that the device was a Class III gaming device requiring a Tribal-State Compact for its legal operation.[63] The tribal gaming operation at issue was located in Oklahoma where there were no Tribal-State Compacts in place permitting Class III gaming devices of any nature.[64] On appeal, the D.C. Circuit Court reversed and held that the underlying game involved pull-tabs, a Class II game, and that the machines simply facilitated the playing of paper pull-tabs.[65] Thus, the Court found the machines to be Class II electronic aids and not Class III facsimiles.[66]

### 4. *United States v. Santee Sioux Tribe of Nebraska*

In this case, the Eighth Circuit affirmed the lower court's ruling, which followed the same reasoning in the *Diamond Game* case, described above.[67] At issue in the *Santee Sioux* case were the same Lucky Tab II machines as in the *Diamond*

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[59] *162 MegaMagnia Gambling Devices*, 231 F.3d at 719-20.

[60] *Id.* at 724-25.

[61] *Id.* (internal citations omitted).

[62] Diamond Game Enters. v. Reno, 230 F.3d 365, 367 (D.C. Cir. 2000).

[63] *Diamond Game Enters.* 230 F.3d at 368.

[64] *Id.*

[65] *Id.* at 370.

[66] *Id.* at 371.

[67] United States v. Santee Sioux Tribe of Neb., 324 F.3d 607, 613-14 (8th Cir. 2003), *cert. denied*, 540 U.S. 1229 (2004); *see Diamond Game Enters.*, 230 F.3d at 365.

*Game* decision.[68] As a result, the court held that the devices could be operated legally in the tribal casino without a compact from the State of Nebraska.[69]

In late 2003, the Department of Justice (DOJ) filed a Petition for Writ of Certiorari with the Supreme Court.[70] On March 1, 2004, the Supreme Court denied the Petition.[71] The dispute underscored long-running tensions over the types of machines that tribes can offer at their casinos. Moreover, the classification of gaming devices has been a continuing source of friction between the DOJ and the NIGC. There have been several situations where the NIGC concluded that a device was a Class II game, but the DOJ disagreed. Indeed, in the *Santee Sioux* case, the NIGC had determined that the Lucky Tab II games were Class II games.[72] The DOJ nevertheless chose to take enforcement actions against the Tribe.

In its Petition, the DOJ contended that the Eighth Circuit's decision in the *Santee Sioux* case, holding that "IGRA does not provide Tribes with any exemption from the Johnson Act when they use gambling devices in the absence of an approved tribal-state compact," conflicts with the Tenth Circuit's holding in the *Seneca-Cayuga* case.[73] The DOJ claimed that the Eighth Circuit was wrong in finding that the Lucky Tab II was not a gambling device within the meaning of the Johnson Act.[74] The DOJ argued that the Johnson Act is intended to define "'gambling device' in the most expansive terms possible, precisely to prevent ingenious manufacturers from slipping their devices through some linguistic loophole."[75]

Nevertheless, the Supreme Court denied the Petition for Writ of Certiorari without comment, deflating the argument

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[68] *Santee Sioux*, 324 F.3d at 610.

[69] *Id.* at 616.

[70] Petition for a Writ of Certiorari at 1, States v. Santee Sioux Tribe of Nebraska, 540 U.S. 1229 (2000) (No. 03-762).

[71] *Santee Sioux*, 540 U.S. at 1229.

[72] *Santee Sioux*, 324 F.3d at 609.

[73] Petition for a Writ of Certiorari at 2, *Santee Sioux* (No. 03-762).

[74] *Id.*

[75] *Id.* at 9-10.

that there is any real conflict between the Eighth and Tenth Circuits.[76] As a result, the Santee Sioux Tribe of Nebraska is permitted to continue to use an electronic machine similar to pull-tabs.[77]

### 5. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*

This case again involved tribal gaming operations in Oklahoma.[78] The gaming device at issue here was the "Magical Irish Instant Bingo Dispenser System," manufactured by Diamond Game Enterprises.[79] The lower court granted the tribes' request for a declaratory judgment that the gaming device was not an illegal "gambling device" under the Johnson Act and that it was a permissible technologic aid to Class II gaming under IGRA.[80] The Tenth Circuit affirmed and cited with approval the other cases discussed above in so holding.[81]

In late 2003, the DOJ filed a Petition for Writ of Certiorari with the Supreme Court concerning this case as well.[82] On March 1, 2004, the Supreme Court denied this Petition also.[83] In its Petition, the DOJ contended that the Tenth Circuit has "eviscerated the Johnson Act as a tool for policing casino-style

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[76] *Santee Sioux*, 540 U.S. at 1229.

[77] *See* David Melmer, *Santee Sioux Win*, INDIAN COUNTRY TODAY, Mar. 5, 2004, *available at* http://www.indiancountry.com/content.cfm?id=1078505394. The Santee Sioux Tribe has not been as fortunate in its pursuit of Class III gaming. In June of 2004, the Department of Interior made a determination on the scope of Class III gaming that the Tribe may conduct. This letter was in response to the Tribe's request for authorization of a large variety of Class III games. The Department of Interior determined the scope of Class III gaming in Nebraska to be quite limited and sanctioned only: (1) lotteries; (2) keno; and (3) pari-mutuel horse and dog racing. *See* Letter from United States Department of the Interior, Office of the Secretary, to the Santee Sioux Tribe of Nebraska (June 29, 2004) (on file with author).

[78] Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

[79] *Seneca-Cayuga*, 327 F.2d at 1021.

[80] *Id.*

[81] *Id.* at 1043-44.

[82] Petition for a Writ of Certiorari at 1, Ashcroft v. Seneca-Cayuga Tribe of Okla., 540 U.S. 1218 (2004) (No. 03-740).

[83] *Seneca-Cayuga*, 540 U.S. 1218 (2004).

gaming in Indian country."[84] The DOJ argued that "the continued application of the Johnson Act is essential to fulfilling Congress's purpose in enacting IGRA to ensure the existence of a regulatory regime for lucrative casino-style gaming that is sufficient to protect against corruption."[85]

In responding to the DOJ's Petition, the tribes argued that "the particularities of how to define a Johnson Act gambling device is not an issue worthy of review."[86] The tribes argued that such an analysis is fact-intensive and not proper for Supreme Court review.[87] The Supreme Court apparently agreed.

A number of states had filed a brief of amici curiae, in support of the DOJ's position.[88] The amici contended that, by allowing slot machines as Class II gaming devices, the Tenth Circuit had undermined Congress's intent that a tribal-state compact govern slot machines.[89] The amici further argued that the Petition should be granted to resolve a circuit court conflict regarding the relevance of the Johnson Act in determining Class II gaming status.[90] However, with the denial of the Petitions for Certiorari, it appears the circuit court conflict issue may be dead for the time being.

### *B. NIGC Classification Process and Opinions*

#### 1. NIGC Process

As noted above, the IGRA and the NIGC regulations are less than clear as to the process for the classification of games. The NIGC first proposed regulations establishing a formal process for the classification of games on November 10, 1999.[91]

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[84] Petition for a Writ of Certiorari at 8, *Seneca-Cayuga* (No. 03-740).

[85] *Id.* at 9.

[86] Opposition to Petition for a Writ of Certiorari at 26, *Seneca-Cayuga* (No. 03-740).

[87] *Id.*

[88] Brief of Amici Curiae States of California, Alabama, Connecticut, Massachusetts, Minnesota, Nebraska, Nevada, South Dakota and Texas at 1, *Seneca-Cayuga* (No. 03-740).

[89] *Id.* at 7-10.

[90] *Id.* at 10-11.

[91] Classification of Games, 64 Fed. Reg. 61234 (proposed November 10, 1999)

These proposed rules were withdrawn on July 12, 2002.[92]

The proposed rules required the NIGC to decide that a game was Class II before the game was authorized for play in a Class II gaming operation.[93] The proposed rules made it clear that the Tribal casinos were not permitted to offer any games without a classification decision that the game was a Class II game unless the game was offered pursuant to a Class III compact.[94] The NIGC proposed that Tribes would be subject to enforcement action by the NIGC if they offered games as Class II without a classification decision.[95]

Currently, there are three methods available for addressing the classification of games.[96] The first method entails formal notice and comment rulemaking.[97] While this method "produces certainty and finality, the process is slow, cumbersome, and insufficiently nimble to be practical for use on a routine basis."[98]

The second method is through the use of advisory opinions prepared by the NIGC's Office of General Counsel upon request by an interested party. Such opinions are "merely advisory in nature and not the result of formal administrative processes."[99] As such, these opinions are not entitled to the level of deference that must be accorded to final decisions of the NIGC, though certain courts have granted them limited deference in certain circumstances.[100]

Under the NIGC's existing process for issuing a game classification opinion for any electronic game, the NIGC must evaluate the elements of the game and determine whether the

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(to be codified at 25 C.F.R. pt. 504).

[92] Classification of Games, 67 Fed. Reg. 46134 (withdrawn July 12, 2002).

[93] *See* Classification of Games, 64 Fed. Reg. 61234 (proposed November 10, 1999) (to be codified at 25 C.F.R. pt. 504).

[94] *Id.* at 61235.

[95] *Id.*

[96] *See* Classification of Games, 67 Fed. Reg. 46134 (withdrawn July 12, 2002).

[97] *Id.*

[98] *Id.* at 46135.

[99] *Id.*

[100] *Id.* (citing *162 MegaMania Gambling Devices* and *Diamond Game Enterprises v. Reno* decisions).

game is an "electronic aid" to the play of a Class II game, or an "electronic or electromechanical facsimile" of a game of chance or a slot machine.[101]

A formal administrative enforcement action is the third method for addressing classification of games.[102] This could entail an enforcement action by the NIGC or an action pursued by the Justice Department. Again, while such an action produces reliable results through a court decision, the process itself is time-consuming, resource-intensive and quite lengthy.[103]

None of the three methods is ideal. However, absent a clear classification procedural process, the NIGC has no other option but to follow the status quo – "which has been unsatisfactory to all concerned."[104]

2. Tribal Casinos Are Responsible for Operating Legal Games

With the withdrawal of the proposed NIGC regulations, the classification of games continues to be an ad hoc process. Pursuant to NIGC Chairman Phil Hogen's letter of May 15, 2003, to the Oklahoma tribes, it seems clear–at least with respect to the current NIGC leadership–that the classification of games is a *tribe's* responsibility and the tribe takes the risk of operating a game that does not meet the Class II definitions of the IGRA.[105]

In the Oklahoma tribes' situation, the NIGC was of the viewpoint that, notwithstanding various NIGC and other enforcement actions taken to stop illegal Class III gaming activities, the offending games were simply renamed or reconfigured.[106] Such actions, in the NIGC's mind, failed to make the games legal.[107]

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[101] 25 C.F.R. § 502.7(a).

[102] *See* NIGC Compliance and Enforcement Provisions, 25 C.F.R. § 573 (2004).

[103] Classification of Games, 67 Fed. Reg. 46134, 46135 (withdrawn July 12, 2002).

[104] *Id.*

[105] Letter from Phil Hogen, NIGC Chairman, to the Oklahoma tribes (May 15, 2003) (on file with author).

[106] *Id.*

[107] *Id.*

Hogen specifically opined:

> The theme of a game, and the name and graphics that go with that theme, are not the determining factors in whether a particular game can be played. The graphics and the theme are merely cosmetic features, and [the] list of possible names would be endless. Just because a vendor comes up with a new name and new graphics to replace the name of a game listed in the [NIGC] decision does not mean that the device can be played lawfully in the absence of a compact. The game themes and names can be easily changed, sometimes in a manner of minutes. The operating characteristics of a device are the keys to its classification.[108]

NIGC Chair Hogen went on to state that the NIGC decisions and applicable Federal case law are "sufficient precedent to classify these machines as Class III devices."[109] Hogen mandated that all of the Class III devices must be "promptly removed from tribal gaming facilities in Oklahoma."[110] Hogen noted that his:

> intention is to stop this activity by first seeking the assistance and cooperation of the tribal regulators and, second, by bringing enforcement actions against those operations that continue to operate these machines. We all want a level playing field for tribal gaming facilities in Oklahoma, but the playing field must be a lawful one.[111]

At least with respect to the tribal gaming facilities in Oklahoma, the NIGC is of the viewpoint that the tribal gaming commission and tribal leadership are responsible for determining that the gaming activities are legal.[112] They cannot simply sit back and continue to operate the games on the mere assertion that they are Class II until the NIGC determines otherwise. Tribal gaming operations taking such an approach,

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

risk the issuance of a notice of temporary closure and issuance of a fine, without any further warning or notice from the NIGC.[113]

### 3. Advisory Opinions

As noted above, the NIGC definitions have not been viewed by the courts as particularly useful in distinguishing between technologic aids and facsimiles, the latter being viewed as a Class III game.[114] As a result, two NIGC advisory opinions, issued in the Fall of 2003, concluded that two bingo games were Class II games under IGRA and therefore could be played in tribal casinos without the necessity of a Tribal-State Compact. These NIGC opinions, and others, are summarized below.

#### *(a) Reel Time Bingo [September 23, 2003]*

In April, 2002, the NIGC issued an advisory opinion concluding that Multimedia's MegaNanza game was a Class III game.[115] Multimedia promptly sued the NIGC over its decision, which ultimately resulted in a settlement.[116] The settlement provided that Multimedia would substitute its Reel Time Bingo game for the MegaNanza machines.[117] Upon examination of the Reel Time Bingo game's characteristics, the NIGC concluded that Reel Time Bingo met each of the three specific criteria for bingo under the IGRA.[118] Therefore, Reel Time Bingo was deemed to be bingo under the IGRA.[119]

In evaluating these elements, the NIGC noted that the electronic card is readily visible and is integral to the play of the game.[120] These facts were viewed as "critical" to the NIGC's opinion that Reel Time Bingo met the first statutory

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[113] 25 C.F.R. § 573.

[114] 25 U.S.C. § 2703(7)(B)(i)-(ii) (2000).

[115] Reel Time Bingo Advisory Opinion, NIGC (Sept. 23, 2003), *available at* http://www.nigc.gov/nigc/documents/opinions/reeltimebingo.jsp.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

criterion that the game be played for prizes with cards bearing numbers or other designations.[121]

The second statutory requirement is that the holder of the card covers when objects are drawn.[122] The NIGC found that Reel Time Bingo met this requirement because the "numbers are released sequentially and players all have the same opportunity to cover (or daub) immediately upon release of each series of drawn balls."[123]

The final requirement is that the game must be won by the first person covering a previously designated arrangement of numbers or designations on such cards.[124] Reel Time Bingo met "this criterion by having the first person who covers one of several pre-designated patterns win the prize associated with that pattern."[125] The fact that the game had interim or bonus prizes did not negate this finding.[126]

The NIGC further found that the electronic characteristics of Reel Time Bingo fell within the category of an electronic aid.[127] The NIGC determined that the Electronic Player Station on which the game may be played broadened participation in the game through the linking of players within the same tribal casino or other tribal casinos.[128] The Electronic Player Station also was found to allow "'multiple players to play with or against each other,' which is one of the exceptions to the definition of electronic facsimile for bingo games."[129] The NIGC found that the Reel Time Bingo machines broadened participation and also required the players "to play against other participants rather than just against the machine."[130]

As a result of the Reel Time Bingo game, the NIGC also issued Bulletin No. 03-3 providing "Guidance on Classifying

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* (quoting 25 C.F.R. § 502.8 (2004)).
[130] *Id.*

Games with Pre-Drawn Numbers."[131] This Bulletin specifically addresses one of the statutory requirements of a Class II bingo game: that the "holder of the card covers such numbers or designations when objects . . . are drawn or electronically determined."[132] The Bulletin also addresses whether games similar to bingo must meet this requirement.[133]

The NIGC concludes in its Bulletin that the statutory requirement for bingo is met only when numbers or designations are drawn after a player begins play of the game.[134] The NIGC further concludes that, in order to constitute a game similar to bingo, numbers must likewise be drawn after play of the game begins.[135]

*(b) Mystery Bingo [September 26, 2003]*

Mystery Bingo is a "linked bingo system using technological aids," developed by Sierra Design Group.[136] The game "is played electronically on a networked system of components."[137] "Participation at the player level is accomplished through player terminals that can be physically configured in a wide range of appearances."[138] The Bingo Game Controller is a computer that coordinates and connects participants in the game.[139] "The 'Bingo Game Manager' is a computer that electronically determines numbers for use in the game."[140] The Mystery Bingo game is generally played among players on a

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[131] Guidance on Classifying Games with Pre-Drawn Numbers, NIGC Bulletin No. 03-3 (Sept. 23, 2003), *available at*http://www.nigc.gov/nigc/documents/bulletins/NIGC-03-3.jsp.

[132] *Id.*; 25 U.S.C. § 2703(7)(A)(i)(II) (2000).

[133] NIGC Bulletin No. 03-3, *supra* note 131.

[134] *Id.*

[135] *Id.*

[136] Sierra Design Group "Mystery Bingo" Game Classification Opinion, Advisory Opinion, NIGC (Sept. 26, 2003), *available at* http://www.nigc.gov/nigc/documents/opinions/mysterybingoopinion.jsp [hereinafter "Mystery Bingo" Advisory Opinion].

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

central system whereby the players compete for prizes and a progressive jackpot.[141]

As with the Reel Time Bingo game, the NIGC also determined that Mystery Bingo met the three statutory criteria for bingo.[142] Although the "cards" for Mystery Bingo exist only on a computer graphic at the individual player stations, the NIGC determined that electronic cards are permissible technologic aids (citing the amended NIGC definitions).[143]

The NIGC found as crucial to its Class II determination the fact that Mystery Bingo "contains an aspect of the race or contest important to the game of bingo."[144] "The game provides for at least two electronic determinations of numbers (ball draws) before a player can win the primary bingo game."[145] "The game also requires all players to daub."[146]

## V. Development of Technical Standards

As a result of the uncertainty surrounding game classification, the NIGC is working on developing comprehensive technical standards for Class II gaming devices.[147] These technical standards will serve as an attempt on the NIGC's part to clarify this very unclear area of gaming law.[148]

Early in 2004, the NIGC commenced the process of forming a Joint Federal-Tribal Class II Game Classification Advisory Committee (Committee).[149] This Committee includes a number of tribal representatives.[150] The NIGC intends to retain

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[141] *Id.*

[142] *Id.*; *see also* Reel Time Bingo Advisory Opinion, *supra* note 115.

[143] "Mystery Bingo" Advisory Opinion, *supra* note 136.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Press Release, Nat'l Indian Gaming Comm'n, National Indian Gaming Commission Selects Class II Game Classification Standards Advisory Committee Members (March 8, 2004), *available at* http://www.nigc.gov/nigc/documents/releases/PR030804.jsp.

[148] *Id.*

[149] *Id.*

[150] *Id.* The following is a list of the Committee members: 1) Norm DesRosiers, Commissioner, Gaming Commission, Viejas Band of Kumeyaay; 2) Mark Garrow,

an independent technical advisor to assist the Committee on technical issues.[151]

The Committee is charged with preparing an initial draft of proposed technical standards.[152] The NIGC intends to promulgate Class II Game Classification Standards and Class II Game Technical Standards separately.[153] In a May 2004 Timeline disseminated to Committee members, and revised as of December 15, 2004, the NIGC plans to distribute the draft rules to other tribes and other interested parties for a thirty-five day review and comment period in advance of the formal Rulemaking Process.[154]

Based upon comments received through this process, the NIGC plans to have a "courtesy copy" of the draft rules published in the Federal Register as the proposed rule.[155] There will be a sixty-day public comment period for the proposed rule.[156] Thereafter, the NIGC will publish the Final Rule in the Federal Register. Whether that happens in 2005 remains unknown.[157]

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Inspectors Manager, Gaming Commission, St. Regis Mohawk Tribe; 3) Joseph Carlini, Executive Director, Gaming Commission, Agua Caliente Band of Cahuilla; 4) Melvin Daniels, General Manager, Muckleshoot Indian Bingo; 5) Kenneth Ermatinger, Executive Director, Gaming Commission, Sault St. Marie Tribe of Chippewa; 6) Charles Lombardo, Sr. Vice President of Gaming Operations, Seminole Tribe of Florida; and 7) Jamie Hummingbird, Director, Cherokee Nation Gaming Commission. *Id.*

[151] *Id.*

[152] *Id.* An early draft (dated July 15, 2004) of the Proposed Classification Standards contains an interesting new definition of "Bingo." Specifically, the draft defines "Bingo" as a game where "competition must build between and among players through the process of successive random draws and releases or electronic determinations of the numbers or other designations necessary to achieve the previously designated winning patterns." This definition, if adopted, could heighten the emphasis on the competition element and potentially require more than two ball draws. A copy of the draft Proposed Classification Standards is on file with the author.

[153] *Id.*

[154] *See* NIGC Timeline (on file with the author).

[155] *Id.*

[156] *Id.*

[157] *Id.*

## VI. CONCLUSION

Class II gaming issues are important for a variety of reasons. Tribes have a vested business interest in being able to classify gaming in such a way as to maintain their sovereignty and avoid state interference. States contend that they have an interest in maintaining some sort of order in the world of gaming devices, as well as a monetary interest in revenue sharing. Others involved in the gaming industry simply want some certainty and predictability as to what devices are viewed as legal. All parties' interests are sure to be affected, one way or another, in the near future. The technical standards that the NIGC is currently working on, in conjunction with the ramifications of the Supreme Court's abstention on this issue, ensure changes are coming in Class II gaming law.

In particular, the Supreme Court's denial of the DOJ's Petitions for Writ of Certiorari in the *Santee Sioux* and *Seneca-Cayuga* cases probably ends the alleged circuit court conflict. The Supreme Court's rejection of the Petitions also will likely impact the direction taken in preparing the NIGC technical standards. Finally, some analysts believe the Court's decision will provide a bargaining chip for the tribes as they lobby states to offer traditional slot machines in the coming years.[158] In short, by refusing to weigh in on the Class II gaming debate, the Supreme Court has in effect done just that.

The tribes and gaming companies have apparently won the battle, but it remains to be seen which side ultimately will win the war of game classification on Indian lands.

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[158] *See* Liz Benston, *Look of Bingo Machines Changing*, LAS VEGAS SUN, March 11, 2004, *available at* http://www.lasvegassun.com/sunbin/stories/sun/2004/mar/11/516509758.html.

# THE TRIAL OF SIR WALTER RALEGH: THE LAW OF TREASON, THE TRIAL OF TREASON AND THE ORIGINS OF THE CONFRONTATION CLAUSE

*Allen D. Boyer*[*]

In November 1603, Sir Walter Ralegh was convicted of treason. From the day on which the sentence of the court was handed down, Ralegh's conviction has been considered a miscarriage of justice. The defendant merited sympathy, the evidence was not compelling, the demand for a conviction was strong, the careers of ambitious men hung in the balance and all of these factors contributed to the doubts surrounding the verdict and sentence. The heavy-handed manner of Attorney-General Sir Edward Coke, who led the prosecution, has been remembered as an egregious example of prosecutorial bullying. The decision has been mourned and held up to scorn as a black day in the history of England and a disgraceful chapter in the history of the common law.

To page through a report of Ralegh's trial is to observe a proceeding which seems to lack coherence. The presentation of the evidence seems fragmented. No structured argument seems to develop. The defendant repeatedly protests that the

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[*] Trial Counsel, New York Stock Exchange Division of Enforcement; author of SIR EDWARD COKE AND THE ELIZABETHAN AGE (2003). Opinions expressed in this article are those of the author and are not necessarily those of the New York Stock Exchange, Inc. or any of its officers. An earlier version of this article was presented at the University of Mississippi School of Law under the auspices of the National Center for Justice and the Rule of Law. Particular thanks are due to Center Director Thomas K. Clancy, Professor Michael Hoffheimer and Dean Samuel M. Davis.

government has changed the rules for his prosecution. He claims that the government plans to convict him without sufficient evidence; he says that it needs two witnesses. He demands to be allowed to confront the main witness against him.

Very recently, in deciding *Crawford v. Washington*, the United States Supreme Court demonstrated that *Sir Walter Ralegh's Case* is not merely a bleak episode of legal history, but rather that it remains a vital legal precedent, one from which a redeeming lesson may be drawn. The Court's decision promises to work substantial changes in the law and practice of criminal investigations. In a break with existing precedent, *Crawford* requires, in any case where a witness is not present for trial, that the witness' prior "testimonial statements," no matter how apparently reliable, may not be used, unless the witness is unavailable and the defendant had the prior opportunity to cross-examine the witness.[1]

Remarkably, *Crawford v. Washington* rejected the familiar modern approach, the balancing test, choosing instead a hard-and-fast categorical rule. It equally rejected the traditional approach, identified with the civil law of the Continent, which has allowed investigators to gather *ex parte* statements from witnesses in preparation for trial, and then to present them in lieu of live testimony. It did this expressly to avoid the risks of injustice which *Ralegh's Case* presented. Justice Scalia's opinion makes this plain:

> The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th Centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that

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[1] Crawford v. Washington, 124 S. Ct. 1354, 1369 (2004).

> the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." The judges refused, and despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.[2]

The trial of Ralegh continues to illustrate the risks of allowing out-of-court statements to substitute for in-court testimony – of treating untested testimony as credible proof. As the Supreme Court further observed in *Crawford*, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[3]

Of Ralegh's trial, Sir James Fitzjames Stephen wrote: "The extreme weakness of the evidence was made up for by the rancorous ferocity of Coke, who reviled and insulted Raleigh in a manner never imitated, so far as I know, before or since in any English court of justice, except perhaps those in which Jeffries presided."[4] "By his brutal conduct to the accused," Lord Campbell wrote, in similar vein, "[Coke] brought disgrace upon himself and upon the English bar."[5] There were any number of exchanges between the defendant at the bar and the Attorney-General. Coke directed against Ralegh a bitter stream of invective: *I will prove you the notoriest traitor that ever came to the bar. Thou art a monster; thou hast an English face, but a Spanish heart. Thou art the absolutest traitor that ever was. There never lived a viler viper. Thou hast a Spanish heart, and thyself art a spider of hell.*[6]

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[2] *Crawford*, 124 S. Ct. at 1360 (alteration in original). The spelling preferred for Sir Walter's surname has varied over time. A review of the man's own letters includes such signatures and usages as Ralegh, Raleighe, Raulegh, Rauley, Rawley, and Rylly, with Ralegh most often employed.

[3] *Id.* at 1371.

[4] 1 SIR JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 333 (London, MacMillan 1883).

[5] 1 LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 364 (London, J. Murray 1849).

[6] *Trial of Sir Walter Ralegh*, *in* 2 STATE TRIALS 7, 9, 20, 26 (William Cobbett ed., London, R. Bagshaw 1809) [hereinafter STATE TRIALS]. Except as otherwise

Yet at the same time, in terms of conclusions to be drawn, there remains a tension between what the rules of evidence demand and what the sifting of fact suggests. To be blunt, it is likely that Ralegh was guilty. Sympathy for the defendant and distrust of the process which convicted him cannot dispel certain suspicions which are ineradicably rooted in the historical record. Ralegh was the only individual who faced the panel of judges that day; but his guilt was bound up inextricably with the guilt of Henry Brooke, Lord Cobham. Shortly after Ralegh's trial, Cobham was found guilty of treason on his own confession. Ralegh's fate may be considered a function of what Cobham had done.

Nor can the trial be approached solely by considering what Ralegh had *done*. Ralegh, personally, had *done* very little. Rather, the question is, how much Ralegh had *known* about treasonous actions being set in motion by Lord Cobham and why he had nonetheless done so little about them.

We should also attempt to understand Ralegh's trial, despite its apparent chaos, as an example of a structure which broke down. Ralegh's trial reflected a mode of trial which relied upon confrontation. It shows all the risks of a system in which procedure had not been clearly defined – in which exchanges were anticipated. In the courtroom that day, both sides sought to misdirect. Sometimes they both succeeded. Recently, materials have been discovered which allow us to understand the prosecution's arguments. These show that the government began with a carefully prepared plan which, in the courtroom, degenerated into a melée.

### *Dramatis Personae*

Sir Walter Ralegh has always been considered one of the

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cited, quotations are taken from this edition and printing. Spelling in this and other early modern sources has generally been modernized throughout. Other reports of the trial are found in 2 David Jardine, Criminal Trials 389-520 (London, Charles Knight 1835); 1 Edward Edwards, Life of Sir Walter Ralegh 383-439 (London, MacMillan 1868); B.L. Harl. MS 39, folios 275-322v.

most heroic figures of a heroic age.[7] Ralegh ranked as both a soldier and a mariner. He fought in England's Irish wars and he outfitted expeditions against the Spanish Main. He organized voyages of discovery, and did his best to plant an English colony in North America, on the Carolina sounds. He is said to have introduced the turkey into England, the potato into Ireland and tobacco into the world at large. He was an elegant man who wore a celebrated pearl earring, which is displayed in most of the numerous portraits for which he sat.

Ralegh was a courtier. The traditional story, that he came to Queen Elizabeth's attention by throwing down his cloak so that she could walk across a mud puddle in her path, is unsubstantiated—but the story is wholly in character, it is long-established and there is no compelling reason to disbelieve it. Ralegh was also a member of the Middle Temple and a member of the House of Commons. He earned a reputation for alchemy and medicine, as well as for atheism, and he proved something of a scholar. His poetry and his *History of the World* have a sarcastic bite to them, which has helped to keep them fresh. (He was asked why he had not written the history of his own time. He replied that history was like a mule, which would kick out your teeth if you followed it too closely.)

Ralegh was the commander of the bodyguard of Elizabeth I. Then even more than now, this was a position of absolute trust. In the last months of Elizabeth's reign, James VI, King

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[7] Dr. Mark Nicholls of St. John's College, Cambridge, co-author of the entry on Ralegh for the *New Oxford Dictionary of National Biography*, is currently writing an in-depth biography. For previous biographies and specialized biographical essays, see STEPHEN COOTE, A PLAY OF PASSION: THE LIFE OF SIR WALTER RALEGH (1993); STEPHEN J. GREENBLATT, SIR WALTER RALEGH: THE RENAISSANCE MAN AND HIS ROLES (1973); CHRISTOPHER HILL, INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION REVISITED (rev. ed. 1987); A.L. ROWSE, RALEGH AND THE THROCKMORTONS (1962); RALEIGH TREVELYAN, SIR WALTER RALEGH (2004); BRUCE J. WILLIAMSON, SIR WALTER RALEGH AND HIS TRIAL (1963); John W. Shirley, *The Scientific Experiments of Sir Walter Ralegh, the Wizard Earl, and the Three Magi in the Tower, 1603-1617*, 4 AMBIX, Dec. 1947, at 52-66. Throughout this article, except as otherwise noted, statements of fact regarding Ralegh's life and career may be verified out of these. It is to antiquarian John Aubrey that we owe the recollection of Ralegh arguing for the commonwealth. *See generally* CHRISTOPHER M. ARMITAGE, SIR WALTER RALEGH: AN ANNOTATED BIBLIOGRAPHY (1987).

of Scotland, wrote secretly to Ralegh, to ascertain whether Ralegh would support James's claim to succeed to the English throne. Ralegh replied that he could not discuss any other person's right to the throne while Elizabeth lived.

Queen Elizabeth died in March 1603. The next month, King James traveled south from Edinburgh and was welcomed by crowds nearly every mile of the way. One of the few Englishmen who is reported to have looked sourly on the new king was Ralegh. Reportedly, Ralegh argued, to those few members of the government who were willing to listen, that the realm should not install a new monarch, but rather become a republic on the model of Venice. By the time Ralegh finally came north to greet the new King, it was too late for his submission to be welcome. James made one of his typical, unfunny puns, saying "I have heard very raw-ly of thee."

James was crowned King of England on July 25, 1603. Within the first three years of his reign, there were three major attempts to overthrow the government. Two of these were set in motion even before James had been crowned. Very significantly, the conspirators were not outsiders. The plots involved member of the Privy Council, foreign ambassadors, veteran soldiers, Jesuit priests and inventive mathematicians. The conspiracies culminated in the Gunpowder Plot of November 1605, in which a well-organized group of Roman Catholic conspirators came very close to blowing up, with thirty-six concealed barrels of gunpowder, essentially all important figures in the government of England: the King, the Privy Council, the House of Lords, the House of Commons, the judges, and other ministers of state.

## THE BYE PLOT AND THE MAIN PLOT

The first of the plots was set in motion within weeks after the King reached London.[8] Two Catholic priests, Father Wil-

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[8] The most careful treatment of the Bye Plot is its post-mortem by Mark Nicholls, *Treason's Reward: The Punishment of Conspirators in the Bye Plot of 1603*, 38 HIST. J. 82 (1995); *see also* LADY ANTONIA FRASER, FAITH AND TREASON: THE STORY OF THE GUNPOWDER PLOT (1996); 2 ROLAND G. USHER, THE RECON-

liam Watson and Father William Clarke, attempted to mount a coup d'etat. Their plan was to surprise the King with a sudden assault of several hundred Catholic gentlemen, who would appear at the court disguised as loyal subjects presenting a petition. They would then overpower the guards, take possession of the king's person and, after seizing the Tower of London, require the King to declare religious toleration. This assault was scheduled for Midsummer Night, June 24, 1603.

As part of the conspiracy, the priests had recruited several gentlemen who either had military experience or imagined that they did. None of these officers—who included the Puritan nobleman Lord Grey as well as the veteran Roman Catholic conspirator Sir Griffin Markham—seemed to have trusted any other participant. With all of the main conspirators distrusting each other, the conspiracy did not materialize. There was no attempt to seize the King on Midsummer Night, and within three weeks the government had begun to arrest the conspirators. By the middle of July, the government had learned that there was actually another plot afoot—one which appeared to be considerably more dangerous.

One of the gentlemen whom the priests had recruited was the younger son of a prominent aristocratic family, named George Brooke. George Brooke had an older brother: Henry Brooke, Lord Cobham, Warden of the Cinque Ports. George Brooke, when questioned by the Privy Council, began to reveal details of Lord Cobham's plotting. Brooke testified that his brother had remarked that Brooke and the priests were on merely the Bye Plot, whereas Cobham and his friend Sir Walter Ralegh were on the Main Plot; and the purpose of the Main Plot was to "take away the king and his cubs."[9] Cobham was

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STRUCTION OF THE ENGLISH CHURCH 285-310 (1910).

[9] *See* Mark Nicholls, *Sir Walter Ralegh's Treason: A Prosecution Document*, 110 ENG. HIST. REV. 902 (1995); Mark Nicholls, *Two Winchester Trials: The Prosecution of Henry, Lord Cobham, and Thomas, Lord Grey of Wilton, 1603*, 68 THE BULL. OF THE INST. FOR HIST. RES. 26 (1995) [hereinafter *Winchester Trials*]. The following narrative of the background which led to Ralegh's prosecution, as well as much of the reconstruction of the trial, follows the historical reconstruction and concurs with the inferences and conclusions in these two works.

arrested. Ralegh was taken into custody. He was questioned. He denied knowing anything about what Cobham might have done. Then, suspiciously, he told Robert Cecil that Cobham knew something about Charles de Ligne, Count Aremberg, the ambassador from the Spanish Netherlands. He offered a peculiar, coded suggestion to the government's investigators:

> [I]f your honors apprehend the merchant of St. Helens, the stranger will know that all is discovered of him, which perchance you desire to conceal for some time. All the danger will be least if the merchant flies away. If any man knows any more of the Lord Cobham, I think he trusted George Wyatt of Kent.[10]

At almost the same time, Ralegh managed to send a message to Cobham, assuring Cobham that he had told the government nothing, and he advised Cobham that the government could not prove treason unless it had two witnesses. If both of them said nothing, they would both be in the clear.

In charging Ralegh with treason, the government faced a problem. If it wanted to prove that Ralegh had committed acts of treason, it could prove very few. In fact, Ralegh's treasonous actions may have been no more than the corrosive mutterings of a single angry evening.

In April or May of 1603, Ralegh went to the new king's court and left it angry. This was the period when he was being replaced as head of the royal bodyguard and when the King was forcing him to move out of Durham House, the London mansion which he had occupied. That evening, whenever it was, Ralegh arrived, still angry, at a dinner meeting with Lord Cobham. He said something about discontent with the King, said something else about stirring up rebellions and let fly a few suggestions about where a Spanish army could land. Ralegh knew Cobham was friendly with Ambassador Aremberg. Ralegh may have told Cobham that if Aremberg were to pay him a pension, using Spanish money, he could let the Spaniards know what the Dutch were planning. In English

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[10] Nicholls, *supra* note 9, at 919.

politics, Ralegh was one of the English commanders who favored continuing the war with Spain. He may have told Cobham, that fatal evening, that if the Spanish wanted a peace treaty, he was really the one whom they really ought to be trying to bribe.[11]

These facts were not the most damning which could be imagined. However, Ralegh was a constant companion of Cobham, and this was a situation in which guilt by association raised itself as a possibility. Ralegh was positioned to know what Cobham was doing, and some of this was damning. Cobham was the wealthiest peer in England. He was the son-in-law of William Cecil, Lord Burghley, the late Queen's most important minister. In the last two years of Elizabeth's reign, Cobham had taken over the prominent place which the Queen's favorites had occupied. He may have thought himself able to govern and entitled to govern.

During the early months of 1603, Cobham had embarked on a very peculiar and dangerous course of action. From Count Aremberg, he had solicited very large sums of money, 500,000 or 600,000 gold crowns. Aremberg likely thought that he was being asked to outbid the Dutch, in terms of buying influence in England. A sum this large could only come from Spain. Cobham had planned to obtain a passport to travel on the Continent, secretly planning to go to Spain. Cobham had secretly written letters to Arbella Stuart, a young noblewoman, and the King's cousin, whom some lawyers thought had a better claim to the throne than James.[12] Most importantly, Cobham's

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[11] Nicholls has written that the picture "of a discontented Ralegh denouncing king and ministers, allowing his fertile imagination to conjure the possibilities of a Spanish descent on the nation that had forsaken him, and subsequently toying with the idea of taking a pension from any amenable foreign power . . . may well portray the sum of his treason in 1603." Nicholls, *supra* note 9, at 910 (footnote omitted). Anna Beer, putting matters with probably an excessive degree of charity, has conjectured that Ralegh, "spurred by a particularly humiliating incident with Robert Cecil, gave his verbal support to the plan to create a domestic political crisis, a crisis that would be highlighted by the specter of imminent foreign invasion." ANNA BEER, MY JUST DESIRE: THE LIFE OF BESS RALEGH, WIFE TO SIR WALTER 142 (2003).

[12] Arbella knew better than to agree to lend her support to any attempt to

brother was George Brooke, who had been recruited by Father Watson and Father Clarke, and Cobham knew at least part of what George Brooke was planning.

By maintaining his friendship with Cobham, Ralegh risked the possibility of being found guilty by association. Nor would it matter, if a treason prosecution were brought, that he had committed few overt acts. As Ralegh remarked to Cobham, perhaps on that very same evening when he complained so angrily, more treason defendants had been hanged for words than for deeds.

## THE MEANING OF TREASON

Over the course of the Sixteenth Century, the attorney-generals and judges of England had succeeded in establishing a broad and highly flexible definition of treason.

In 1603, the primary treason statute in effect in England was still the original treason statute of King Edward III, passed in 1352. This focused closely on the King, the royal family and certain royal officials. The statute made it high treason to "compass or imagine" the death of the King, his heir, or his Queen; to violate the King's consort, his eldest daughter, or his eldest son's wife; and to levy war against the King in his realm, or to adhere to his enemies. For more than a century, until Henry VIII came to the throne, this statute had provided the principal definition of treason. Between 1352 and 1485, there were fewer than ten statutes passed which clarified or redefined what treason was. However, between 1485 and 1603, the period in which the Tudor dynasty ruled, there was a tremendous expansion of the law of treason. John Bellamy, the outstanding authority in the field, has counted the statutes and finds that Tudor parliaments passed no fewer than sixty-eight treason laws.[13]

Traditionally, it was thought that Henry VIII had been the

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depose of her cousin; Cobham burned the correspondence. The career of this unfortunate lady, largely passed under conditions of house arrest, suspicion and disfavor, is narrated in B.C. HARDY, ARBELLA STUART: A BIOGRAPHY (1913).

[13] JOHN BELLAMY, THE TUDOR LAW OF TREASON 12 (1979).

first king to put into effect laws which made words as well as deeds treasonable – that is, made it possible to condemn a defendant for statements which were purely verbal, instead of requiring an overt act. This is not quite true. As early as the beginning of the Fifteenth Century, words by themselves could be found to be treason.[14] What is true is, during the reign of Henry VIII, the law saw a new emphasis on suppressing seditious or inflammatory statements. The King was engaged in building a new church and in ensuring that he had an heir, and the law was changed to cover every scenario that could be anticipated. It was made treason to call the King a heretic, a schismatic, or an infidel, which largely foreclosed the possibility of expressing religious dissent. It was made treason to claim the crown or to interfere with the succession.

During the reigns of Henry VIII's children, the jurisprudence of high treason became increasingly complicated.[15] Treason laws continued to be passed with each new reign and each new crisis. There were both substantive and procedural changes. Some statutes both defined offenses and provided procedures, specifying how these offenses were to be proved. Some of the laws were internally and textually inconsistent. Some of the laws purported to repeal their predecessors. Some of the new treason laws apparently repealed the substantive portions of previous treason laws, while leaving the old provisions on procedure intact. Some statutes specified that, in proceedings brought under their terms, treason trials were to be conducted as in proceedings at common law.

Confusion arose, and both defendants and even the government occasionally were confounded. In *Throckmorton's Case* in

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[14] It had been held treason to call the king a usurper, because this was held to be wishing his death, and thereby compassing or imagining it. *Id.* at 32.

[15] *See id.* at 47-82; L.J. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 104-06 (1968); John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83 (1901); *see also* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972).

1554, a treason prosecution failed because the indictment was apparently based on an outmoded statute.[16] However, in at least one case, a statute was passed which was immediately applied retroactively – in another prominent treason proceeding, *The Duke of Norfolk's Case* in 1571.

Queen Elizabeth's great treason statute of 1571 swept broadly across the political and religious areas, extending the scope of the law and eliminating many distinctions between treason by words and treason by deeds. Of this statute, John Bellamy has written:

> [T]he act's most serious fault was not its severity or scope but that it continued the process of piling treason statute on treason statute in an unmethodical manner when what was needed was a statement of what exactly the scope of treason now amounted to, a codification in fact. This would of necessity have engendered an examination and clarification of the inconsistencies which had arisen since 1553 and which by 1571 were a disgrace to the English law. That there was no such simplification . . . can be explained partly by recognition that it would have been something new to the legal customs of England, partly by the fact that the queen and her legal advisers were finding it increasingly difficult to persuade parliament to pass treason laws in the form in which they were originally drafted and partly by the fact that the government was beginning to find that the shadow of confusion cast by the diffuse treason laws could be to their own, very definite advantage. . . . [W]hen those arraigned were beginning to argue to some purpose in their own defen[s]e, it was preferable that the treason law should remain complex and be interpretable only by judges and serjeants.[17]

Over the course of the Sixteenth Century, a succession of Attorney-Generals and Solicitor-Generals had been consistently

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[16] *Compare* BELLAMY, *supra* note 13, at 55-59, 64-65. In *Throckmorton's Case*, Sir Nicholas displayed the mnemonic capacity which had allowed him to memorize the entire treason statue and the eloquence to talk his way free of a capital indictment. *See* ANNABEL PATTERSON, READING HOLINSHED'S *CHRONICLES* (1994); ANNABEL PATTERSON, THE TRIAL OF NICHOLAS THROCKMORTON (1998).

[17] BELLAMY, *supra* note 13, at 66.

successful in expanding the terms of the treason statutes to cover new dangers as they arose.

In 1517, in and around London, there had been a series of riots known as the Evil May Day. The riots were directed against foreigners. After order was restored, Chief Justice Fyneux called together the judges and the crown lawyers and directed them to draft indictments under the treason statute of 1414. On its face, the text of that statute applied only to guarantee the safety of foreign ambassadors traveling in England under a royal safe-conduct, and the law had previously been applied only against English pirates who violated truces on the high seas. Chief Justice Fyneux now opined that the statute could apply to the riots in London because the riots had caused losses to aliens who were subjects of rulers with whom treaties were in effect, namely, France, Burgundy, and Spain. Moreover, Fyneux asserted, "the insurrection in itself was high treason as a thing practiced against the regal honor of our sovereign lord the king."[18]

Fyneux had looked into the past to find a tool to wield in the present – a favorite strategy of the common lawyer. In the 1590's, the government's lawyers followed his example. They had two very different public disturbances to deal with.

The first disturbance involved an urban mob. In June 1595, a small group of London apprentices were arrested after they threw stones at warders guarding the entrance to the Tower of London. The apprentices were whipped and ordered to be put in the pillory. When this was going on, approximately 300 other apprentices gathered to rescue them. The mob shouted something about killing the mayor and seizing an arsenal. They had a trumpet with them, blowing alarums, and they displayed a cloak on a pole as if it were a flag.[19]

The second disturbance was a rural uprising. In October 1596, in the countryside outside Oxford, a small group of dis-

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[18] BELLAMY, *supra* note 13, at 18-20, 19.

[19] *Id.* at 78; J.H. BAKER, THE LEGAL PROFESSION AND THE COMMON LAW: HISTORICAL ESSAYS 202 (1986); BL Add. MS 6686, fo. 114-115v (Coke's comment on the case in his manuscript notebooks).

contented artisans made a set of vague plans and attempted to gather other discontented men to their standard. They were angry over the high cost of food because there had been a series of bad harvests. They outlined a plan to seize a store of weapons and pull down enclosures, and they talked of a merrier world to come. On the night appointed for the insurrection, only four insurrectionists showed up.

In both of these cases, the mob in London and the failed rebellion in Oxfordshire, it was held that these disturbances were treason. Riot or attempted riot was interpreted to be levying war against the monarch. This shows a restriction slipping out of the law. There was no discussion of whether the rioters meant to do harm to the Queen herself, which the treason statute of 1352 required. And we can also see an extension creeping in. The apprentices had not mentioned the Queen as a target, but they had displayed traditional martial accoutrements, the flag and the trumpet. The rebels in Oxfordshire had meant to attack a whole section of the Tudor state. They meant to assault the households of country gentlemen, a local governing class upon which the central government depended.[20]

The government's lawyers had also exercised all of the traditional skill of the common lawyers when it came to pleading. On the semantic level, they had explored every inch of elasticity within the phrase, "compassing or imagining the death of the king."

For nearly a century before Ralegh's trial, it was settled law that the King was different from ordinary men. Chief Justice Fyneux had ruled that if a defendant had compassed or imagined the death of the King, entirely verbally, the crime of high treason was complete. No action in furtherance of such plan need be proven.[21] This was granting the monarch a par-

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[20] 3 SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 9-10 (London, M. Flesher 1644); John Walter, *A "Rising of the People"? The Oxfordshire Rising of 1596*, 107 Past & Present 90, 137-40 (1985); *Burton and Bradshaw's Case*, 2 Anderson's Reports 4-5 (1596); Popham's Reports 122-23; 7 HISTORICAL MANUSCRIPTS COMMISSION, *Calendar of the Manuscripts of the Marquess of Salisbury Preserved at Hatfield House, Hertfordshire*, at 236 (letter of Coke to Robert Cecil, June 4, 1597).

[21] BELLAMY, *supra* note 13, at 32. This statement was made at the trial of

ticular legal privilege. By contrast, in run-of-the-mill conspiracies where the prospective victim was a commoner, even if the defendant had imagined or compassed the prospective victim's death, at least one action in furtherance of the conspiracy was required.[22]

The attorney-generals had also exercised all of their subtlety as masters of the art of common-law pleading. They had become adept at drafting charges so that it was unclear under which treason act the charges were brought. Bellamy has stated: "The policy . . . of framing indictments so that they might be said to be founded on several statutes was a deceitful subterfuge to gain procedural benefits, like avoiding the need to produce witnesses or to indict within a certain time after the crime was committed."[23]

In particular, there were advantages to construing charges as being brought pursuant to the treason statute of 1352. This act, because it contained no provisions regarding procedure, made it possible to try a defendant without giving him the right to confront the witnesses against him.[24] There was another area in which the confusion of the laws might give the government an advantage. In some circumstances (though not all) the confusion of the laws might allow a conviction to be obtained without the direct testimony of two witnesses.

As far back as Bracton, four hundred years before Coke and Ralegh, common lawyers had generally considered that two

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the Duke of Buckingham for treason in 1521.

[22] COKE, *supra* note 20, at 5.

[23] BELLAMY, *supra* note 13, at 81.

[24] Other treason acts, as discussed below, provided that two witnesses were needed to prove an offense. Where witnesses posed no difficulty, the statute of 1571 offered certain advantages. In 1596, Coke, then Attorney-General, was responsible for trying the Oxfordshire rebels. He argued, as well, for trying them, not under the treason statute of Edward III, but rather under the Elizabethan treason statute of 1571, the statute approved by the judges considering the apprentices' case. The earlier treason statute required the actual levying of war against the crown. The statute of 1571 did not require that. It could be read, a commission of judges had decided, to apply to any general conspiracy among subjects to arm themselves and rise, since "rebellion is all the war which a subject can make against the king." BELLAMY, *supra* note 13, at 79-81, 251 (quoting Popham's Reports, *supra* note 20, at 122-23).

witnesses were needed to prove any contested point. Most authorities had opined that two witnesses were necessary to prove a charge of treason. However, the two-witness rule was never formally made part of the law, by statute or by judicial decision, and, certain prominent judges had always accepted that one witness would be enough. Sir John Fortescue had indicated this, and when Sir Thomas More, a former Lord Chancellor was charged with treason, on the testimony of only one witness, More apparently did not bring a challenge to this point. Only in 1547 did any statute defining treason specify that the testimony of two witnesses was necessary to prove the offenses. This was the treason statute of Edward VI – and, critically, it related expressly only to the offenses which were listed in that statute.

During the last half of the Sixteenth Century, during the reigns of Henry VIII's three children, while dozens of statutes relating to treason were being passed, the situation grew very uncertain. By the autumn of 1603, it could probably have been said that the weight of the precedents favored, but did not compel, the testimony of two witnesses. It was a policy; it was a deep-rooted policy; but it was no more than a policy, in an area where the law was not completely settled, and it was a policy to which certain precedents indicated exceptions might be made.

In the autumn of 1603, the government's lawyers prepared their case for trial. They knew a good deal about the defendant. Over the previous forty years, as Ralegh had made his way in and out of favor with the Queen, as he amassed a fortune, as he was sent to the Tower and he made his way out of the Tower again, one strain of his character had been proven; when he was under pressure, he invariably lied.[25] He could lie very convincingly, but it could be taken for granted that he would lie.

They also knew that Ralegh was more interested in saving his life than in asserting his innocence. In the months before trial, Lady Ralegh pulled together all of her family's ready cash

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[25] BEER, *supra* note 11, at xiv.

and reportedly offered a bribe of £5,000 to have the case heard in Star Chamber.[26] Star Chamber was a place where political cases were heard. It was where political disputes were given legal resolution by the government. Officials could have their careers broken there – courtiers and noblemen could be sent from there to be imprisoned, as long as the monarch saw fit – but Star Chamber did not try treason cases, and Star Chamber did not impose death sentences. A political offender who faced treason charges would be very gratified to have his case transferred to Star Chamber. To gain this advantage, there was one crucial condition; the predicate for having one's offenses punished in Star Chamber was verbally confessing your guilt. Ralegh was not only willing to confess his guilt, by implication; he was bidding five thousand pounds for the opportunity to do so.[27]

First, the prosecution lawyers considered, they had testimony from the conspirators.[28] To prove the case against Ralegh, they would rely on a confession which Cobham had made on July 20, the day when he was first confronted with the case against him. Cobham had refused to sign the report of his testimony, and he had later recanted it, but they could introduce a certificate from members of the Privy Council as to what he had said. They also had that cryptic, deliberately coded statement which Ralegh had made very early in the investigation.

> *If your honors apprehend the merchant of St. Helens, the stranger will know that all is discovered of him, which perchance you desire to conceal for some time. All the danger will be least if the merchant flies away. If any man knows any*

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[26] *Id.* at 148.

[27] Over the winter of 1605-1606, as the government suppressed the Gunpowder Plot, the conspirators who had dug the mine and loaded the powder-kegs would be executed, while three peers and the Earl of Northumberland, more distantly involved, were sentenced in *ore tenus* proceedings in Star Chamber.

[28] The government's outline of its case was recorded in a document prepared for and annotated by Lord Chancellor Ellesmere and now located in the Bodleian Library, MS Carte 205, folios 127-135v, *reprinted in* Nicholls, *supra* note 9, at 912-24.

*more of the Lord Cobham, I think he trusted George Wyatt of Kent.*[29]

This showed that Ralegh, very early in the investigation, had shown that he knew about Cobham's dealings with Ambassador Aremberg.

Almost as good as testimony, the lawyers considered, were several "violent concurring presumptions."[30] These were points where facts which Cobham admitted matched up with facts which Ralegh had admitted. In this way, the government planned to establish, through a "concurrency in circumstances," that Cobham and Ralegh had planned to rendezvous in the Isle of Jersey, where Ralegh was governor, after Cobham's return from Spain and that Ralegh was to have 10,000 crowns of the money which Cobham brought with him.[31]

Almost as an afterthought, the prosecutors listed independent evidence which they might use. They had a third-party witness, Lorenzi the Italian merchant, who had carried letters between Cobham and the ambassador and who could testify that Ralegh and Cobham had conferred after receiving the letters. They could bring in a confession from Lawrence Keymis, one of Ralegh's aides, who had brought a message from Ralegh to Cobham. Keymis had told Cobham, from Ralegh, that two witnesses were necessary for a treason conviction; thus, if they both said nothing, both of them were safe. Beyond this, the prosecutors had an English sea-captain,

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[29] Nicholls, *supra* note 9, at 919 (emphasis added). "The stranger" was Aremberg. "The merchant of St. Helens" was Matthew Lorenzi, the Italian merchant who carried messages between Aremberg and Cobham. "George Wyatt of Kent" was a country gentleman who had dealings with Cobham and the son of Sir Thomas Wyatt, who had led an abortive military uprising against Elizabeth's sister, Mary. *Id.* Lorenzi apparently was resettled in Ireland by the English government, or fled there after a bankruptcy in 1606 and may have repaid the favor by reporting on local conditions. Brian Mac Cuarta, *Mathew de Renzy's Letters on Irish Affairs 1613-1620*, 34 ANALECTA HIBERNICA 107 (1987).

[30] Nicholls, *supra* note 9, at 918. Violent here has the sense of compelling; the strongest species of presumption. Coke would write: "*Violenta praesumptio* is many times *plena probatio*." SIR EDWARD COKE, A COMMENTARY UPON LITTLETON 6b (London, Society of Stationers 1628).

[31] Nicholls, *supra* note 9, at 920-21.

named Dyer, who was willing to swear that he had heard on the docks in Lisbon that Ralegh and Cobham would keep the King from ever being crowned. They had Arbella Stuart herself, who could be brought down in a closed carriage and called on, if necessary. They could even cite Ralegh's notorious reputation for atheism and point to the fact that, while a prisoner in the Tower, he had attempted suicide.[32]

To fill gaps in their proof, the prosecution lawyers prepared arguments based on logic and probability. In the grammar school and at the Inns of Court, they had been trained as rhetoricians, and it was on the techniques of classical rhetoric that they relied.[33] They posed rhetorical questions to support their case ("Is it to be imagined that Cobham's sudden mislike of Ralegh should occasion him to accuse himself and Ralegh falsely of treason, and thereby to overthrow himself to be revenged of Ralegh?").[34] They prepared syllogisms to persuade the jury ("Ralegh must have his part of the money, therefore now he is a traitor").[35] They raised questions of probabilities, just as Cicero had recommended.

> There is also a particular reason in this particular case to be observed and drawn from the person of the offender:
>
> Who is Sir Walter Ralegh? A man by nature of an extraordinary wit, and thereby the better furnished to shadow his misdoing. Secondly, a man of too much more than ordinary policy, and thereby the better provided to prevent the

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[32] *Id.* at 922-24.

[33] *See* Allen D. Boyer, *Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition*, 10 INT'L J. SEMIOTICS L. 3, 6 (1997); Karen Cunningham, *"A Spanish Heart in an English Body": The Ralegh Treason Trial and the Poetics of Proof*, 22 J. MEDIEVAL & RENAISSANCE STUD. 327 (1992). *See generally* Richard J. Schoeck, *Lawyers and Rhetoric in Sixteenth-Century England*, *in*, RENAISSANCE ELOQUENCE: STUDIES IN THE THEORY AND PRACTICE OF RENAISSANCE RHETORIC 274-91 (James J. Murphy ed., 1983); Barbara J. Shapiro, *Classical Rhetoric and the English Law of Evidence*, *in* RHETORIC AND LAW IN EARLY MODERN EUROPE 54-72 (Victoria Kahn & Lorna Hutson eds., 2001); Alessandro Giuliani, *The Influence of Rhetoric on the Law of Evidence and Pleading*, 62 JURID. REV. 216-51 (1969).

[34] Nicholls, *supra* note 9, at 920 (footnotes omitted). "*Nota bene*," Lord Ellesmere wrote in the margin at this point.

[35] STATE TRIALS, *supra* note 6, at 17.

discovery of his secret unlawful purposes.[36]

Similarly, the prosecutors asserted that the crime at issue could be analyzed as a function of the defendant's character.

> The nature of the treason is violent and bloody, and not to be executed but by the sword and arms. Cobham of himself is neither of the sword nor ever professed arms, and therefore it is probable (as he affirmeth) that Ralegh being a man of both was the inciter of him thereunto . . . .
>
> Secondly, these treasons could not be either plotted or performed but out of an extraordinary wit and policy, but Cobham of himself is far from them, but Ralegh owner of them all . . . .[37]

## THE CONDUCT OF THE TRIAL

At this time in legal history, the English criminal trial relied upon confrontation.[38] The idea was to bring in the defendant, bring in the evidence against him, watch his reaction, and assess his explanation. Even in the trial of Ralegh, which was as much a political proceeding as it was a criminal hearing, this form was followed.

It was not a situation in which the government presented its case, and then the defense presented its case. Ralegh asked, and was allowed, to answer after each piece of evidence against him was presented. This disrupted the presentation of the government's evidence. The lawyers for the crown must have anticipated this, but they could not avoid it. The result was that, instead of a smoothly developed operation, the trial became a series of exchanges. Coke and the government's other lawyers were able to read the indictment and then to read into the record their most important piece of evidence. This was

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[36] Nicholls, *supra* note 9, at 918 (citations omitted).

[37] *Id.* at 920 (footnotes omitted).

[38] *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800 (1986); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003); Sir John Baker, *Criminal Courts and Procedures at Common Law 1550-1800, in* CRIME IN ENGLAND 1550-1800, 15 (J.S. Cockburn ed., 1977); Samuel Rezneck, *The Trial of Treason in Tudor England, in* ESSAYS IN HISTORY AND POLITICAL THEORY 258 (Carl Wittke ed., 1936).

Cobham's examination of July 20, 1603. It was well for the government lawyers that they did so, because as soon as Ralegh began to answer, the proceeding collapsed into a series of cut-and-thrust engagements. Ralegh was a keenly intelligent man, a very eloquent speaker, a forceful personality, and swift on the uptake. He had legal training and he had had some legal advice, and he used them well. Facing down the lawyers, Ralegh showed a soldier's ability to parry and riposte and a courtier's ability to spin any denunciation to his own advantage.

Ralegh asserted that two witnesses were necessary to prove the charges of treason against him. He cited the treason statute of 1352 and two Elizabethan treason statutes, and finally announced, with typical flair, "You try me by the Spanish Inquisition if you proceed only by the circumstances," *i.e.* by circumstantial evidence, "without two witnesses."[39] Chief Justice Popham responded that the procedures on which Ralegh was relying had been repealed. This ruling was not without support—in allowing proof of guilt by one witness, Popham placed himself in the company of Sir John Fortescue and Sir Thomas More—but this was adopting the minority rule. Ralegh lost this point in the courtroom, but it became a critical part of his personal legend, that the government had turned the law unfairly against him.

Ralegh repeatedly challenged the government to produce Cobham, in open court, to give testimony against him to his face. Probably, Ralegh did not want Cobham in the courtroom any more than the government wanted Cobham there. Neither side wanted the star witness to appear. Cobham had changed his story so many times that he had little credibility left.[40]

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[39] STATE TRIALS, *supra* note 6, at 15.

[40] Ralegh must have known full well that Cobham distrusted him personally; Cobham "was of long time doubtful of Ralegh lest he should betray him, and for proof thereof he told a friend of his not long ago [*i.e.*, before the autumn of 1603] that he thought sometimes that when Ralegh had him in Jersey he would send him to the King." Nicholls, *supra* note 9, at 923. The government also knew that Cobham had spent much of the autumn trying to concoct a personal defense by having his servants write backdated letters, to show that he had changed his

Nevertheless, by asking to have Cobham testify in person, when he knew that the government would not allow it, Ralegh was able to charge the prosecution, indelibly, with injustice and unfairness.

Those who have studied Ralegh's trial have always questioned the government's decision to keep Cobham out of the courtroom. To the modern reader, in particular, the denial of a crucial witness heightens the sense of frustration and sinister absurdity. This point provoked one of the sharpest exchanges of the trial, an angry three-way colloquy among Ralegh, Chief Justice Popham, and Sir Robert Cecil.

> *Ralegh.* All this is but one accusation of my Lord Cobham's, I hear no other thing; to which accusation he never subscribed nor avouched it. I beseech you, my lords, let Cobham be sent for, charge him on his soul, on his allegiance to the king; if he affirm it, I am guilty.
> *Lord Cecil.* It is the accusation of my Lord Cobham, it is the evidence against you: must it not be of force without his subscription? I desire it to be resolved by the judges, whether by the law it is not a forcible argument of evidence.
> *Judges.* My lord, it is.
> *Ralegh.* The king at his coronation is sworn *in omnibus judiciis suis aequitatem, non rigorem legis, observare.* By the rigor and cruelty of the law it may be a forcible evidence.
> *Lord Chief Justice.* That is not the rigor of the law, but the justice of the law; else when a man has made a plain accusation, by practice he might be brought to retract it again.
> *Ralegh.* Oh my lord, you may use equity.
> *Lord Chief Justice.* That is from the king; you are to have justice from us.[41]

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mind about traveling overseas. *Id.* at 917-18.

[41] STATE TRIALS, *supra* note 6, at 16. Cecil was among the commissioners hearing the case. He was the only person whom the trial reports indicate kept his head and maintained his calm. Cecil was an extremely short man, almost a dwarf, and in fact a hunchback. He was also one of the cleverest politicians whom his nation ever produced. Amid the confusion and the name-calling into which the trial degenerated, this dwarfish, hunchbacked little man stepped in masterfully as umpire.

Ralegh was not so angry that he had lost his poet's ability to use language on two levels. The equity which he sarcastically demanded was the fairness to which the common law aspired. At the same time, he also offered a technical legal argument. To use "the equity of a statute," as understood by the lawyers of the day, was to broaden the application of the text, to apply a law by analogy to facts just outside the words of the law.[42] By suggesting that Popham might use equity, Ralegh was arguing that Popham, even at that penultimate moment, might make an exception in his favor.

Another exchange, between Ralegh and the judges, underlined the issue of confrontation once again.

> *Ralegh.* The common trial of England is by jury and witnesses.
> *Lord Chief Justice.* No, by examination: if three conspire a treason, and they all confess it; here is never a witness, yet they are condemned.
> *Justice Warburton.* I marvel, Sir Walter, that you being of such experience and wit, should stand on this point; for so many horse-stealers may escape, if they may not be condemned without witnesses. If one should rush into the king's Privy Chamber, whilst he is alone, and kill the king (which God forbid), and this man be met coming with his sword drawn all bloody; shall not he be condemned to death? . . . .
> *Ralegh.* I know not how you conceive the law.
> *Lord Chief Justice.* Nay, we do not conceive the law, but we know the law.[43]

Ralegh was successful in blunting the impact of the government's evidence. The government had questioned how Ralegh knew so much, beforehand, about Cobham's conspiracy with Aremberg. Ralegh raised questions about the timing of his

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[42] *See* SAMUEL THORNE, A DISCOURSE UPON THE EXPOSICION AND UNDERSTANDINGE OF STATUTES WITH SIR THOMAS EGERTON'S ADDITIONS (1942); George Behrens, *Equity in the Commentaries of Edmund Plowden*, 20 J. LEGAL HIST. 25 (1999); Lorna Hutson, *Not the King's Two Bodies: Reading the "Body Politic" in Shakespeare's Henry IV, Parts 1 and 2, in* RHETORIC AND LAW IN EARLY MODERN EUROPE, 167 (Victoria Kahn & Lorna Hutson eds., 2001).

[43] STATE TRIALS, *supra* note 6, at 18.

statement—about what he had said before Cobham was questioned. This turned the case into a demonstration that he had told the Privy Council as much as he knew, as soon as the investigation began. The government had witness testimony and written examinations, ready to show that Cobham had named Ralegh as his partner in conspiracy, long before Cobham was arrested and blamed Ralegh for his downfall. The examinations were meant to be used as corroborating statements; Ralegh succeeded in condemning them as untrustworthy hearsay. The government knew beforehand that Ralegh and Cobham had managed to maintain a secret line of communications, even after both of them were jailed. They knew that Ralegh had burned at least one letter which Cobham had sent to him. However, the government had to wait to see what Ralegh would do with any letters which he had not burned; and because the government had to complete its case first, Ralegh got in a final word.[44]

It was the end of the hearing. Ralegh had put on an undaunted and eloquent showing. Coke "sat down in a chafe."[45] He could sometimes throw tantrums in the courtroom, and this was one of those moments. After he rose again to his feet, he summed up the case against Ralegh. Then, the defendant and the Attorney-General traded a final round of insults.

> *Attorney.* Thou art the most vile and execrable traitor that ever lived.
> *Ralegh.* You speak indiscreetly, barbarously and uncivilly.
> *Attorney.* I want words sufficient to express thy viperous treasons.
> *Ralegh.* I think you want words indeed, for you have spoken one thing half a dozen times.
> *Attorney.* Thou art an odious fellow, thy name is hateful to all

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[44] *Compare* Nicholls, *supra* note 9, at 905, *with* STATE TRIALS, *supra* note 6, at 12-14 (early knowledge of Ralegh); *compare* Nicholls, *supra* note 9, at 913, *with* STATE TRIALS, *supra* note 6, at 20 (examination testimony of George Brooke, Sir Griffin Markham and Fr. Clarke objected to as hearsay); *compare* Nicholls, *supra* note 9, at 911, *with* STATE TRIALS, *supra* note 6, at 19 (secret communications between Ralegh and Cobham).

[45] STATE TRIALS, *supra* note 6, at 26.

> the realm of England for thy pride.
> *Ralegh.* It will go near to prove a measuring cast between you and me, Mr. Attorney.[46]

Having come to the end of the government's case, Coke still had one significant card left to play. He drew from his pocket a letter which the government had obtained from Cobham. In this letter, Cobham withdrew all of the retractions he had previously made and supplied, once more, a confession which incriminated Ralegh. Cobham protested that he now wrote "nothing but the truth, . . . the whole truth before God and his angels."[47]

As soon as Coke had presented this letter, Ralegh drew from his own coat pocket another letter from Cobham. In *this* letter, Cobham swore fiercely, "I never practiced with Spain by your procurement; God so comfort me in this for my affliction, as you are a true subject, for any thing that I know. . . . God have mercy upon my soul, as I know no treason by you."[48]

The provenance of the letter produced by Ralegh made it dubious. Ralegh had solicited it from Cobham by having a message thrown into Cobham's window, rolled up inside a hollowed-out apple. Its veracity was doubtful. Cobham had changed his story several times since the summer and had taken steps, after the fact, to strengthen his own defense. It must have been written before Cobham wrote for the government the letter which Coke had produced, taking back yet again what he had said in Ralegh's favor. Nonetheless, because Ralegh was able to present his letter last, he was able to give himself the last word in the courtroom.[49]

From any perspective, the trial was badly confused and notoriously free-swinging. There are any number of low points. The chief prosecutor traded insults with the defendant. The defendant traded insults with the prosecution lawyers and turned sarcastic in addressing the presiding judge. The presid-

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[46] STATE TRIALS, *supra* note 6, at 26.
[47] *Id.* at 27.
[48] *Id.* at 28-29.
[49] *Id.* at 26-29.

ing judge made an on-the-spot ruling on a critical procedural question, citing no authority, and adopting a doctrine which only a minority of the precedents approved. The most important witness never entered the courtroom. The spectators, who had almost mobbed the defendant as he was conveyed from prison to the courtroom, shifted allegiance completely. They began to hiss the Attorney-General.[50]

## THE RESULTS OF THE TRIAL

Ralegh was found guilty of treason. Coke's reputation suffered. Justice Gawdy, who was one of the commission, died three years later. Reportedly, his last remark was that the justice of England had never been so perverted as in the prosecution of Ralegh.[51]

Yet to judge by its results, the proceeding was not so decisive as it appeared. Ralegh was not executed. He was not even bankrupted by the forfeiture of his property to the crown. He lived on in the Tower of London, in a comfortable set of rooms, doing alchemical experiments.[52] Coke's success as a lawyer was unaffected. Before Ralegh's trial, he had won convictions of

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[50] "Mr Attorney made many overtures to bring Ralegh in disgrace . . . terming him Spanish Spy and Monster with an English face and Spanish heart, and the like, so long that at length calling him base trash the standers-by began to hiss and Mr. Attorney to be something daunted." Letter from Ortelio Renzo, to Giovanni Antonio Frederico (Jan. 31, 1604), *quoted in* Rosalind Davies, *"The Great Day of Mart": Returning to Texts at the Trial of Sir Walter Ralegh in 1603*, RENAISSANCE F. 1999, *available at* http://www.hull.ac.uk/renforum/v4no.1.

[51] As noted by the Court in *Crawford v. Washington*, 124 S. Ct. 1354, 1360 (2004).

[52] Ironically, Ralegh seemed to have taken all of the name-calling in his stride. A few weeks after the trial, he wrote to Cecil: "Whatsoever your lordship hath conceived, I cannot think my self to have been either an enemy or such a viper, but that this great downfall of mine, this shame, loss, and sorrow, may seem to your lordship's heart and soul a sufficient punishment and revenge." THE LETTERS OF SIR WALTER RALEGH 285 (Agnes Latham & Joyce Youings eds., 1999) (footnote omitted).

Ralegh showed more equanimity than did Lady Arbella Stuart. Lady Arbella wrote of her involvement in the trial that "the vanity of wicked men's vain designs, have made my name pass through a gross and a subtle lawyer's lips of late, to the exercise and increase of their patience, and not their credit." THE LETTERS OF LADY ARBELLA STUART 194 (Sara Jayne Steen ed., 1994).

all but one of the Bye Plotters; and after Ralegh's trial, he won convictions of Lord Cobham and Lord Grey.[53]

It was almost a generation later that the outcome of the case seemed to make itself felt. In 1617, Ralegh was released from the Tower and given command of an English fleet. Officially, he was to make a return voyage to Guiana, to locate a mine of gold. In fact, he may have hoped to capture the Spanish treasure fleet. The voyage was disastrous. There was an attack on a Spanish settlement, no mine of gold could be located, and Ralegh was forced to return to England. To placate the Spanish, the King determined to put Ralegh on trial. The member of the Privy Council who suggested that the hearing on Ralegh should be public was the former Lord Chief Justice, Sir Edward Coke. In a draft decree which Coke prepared and submitted to the King, the Privy Council recommended that a full-scale hearing on Ralegh should be scheduled for the Council Chamber.

This course was not adopted. The King suggested—against Coke's recommendation—that a private judicial hearing be held, at which Ralegh was presented with the report of the investigation of his voyage to Guiana and then executed on the original warrant which had issued in 1603.[54] The King's opinion prevailed.

The intervening fifteen years had seen a sea-change in Coke. He had spent a tempestuous decade, from 1606 through 1616, as a chief justice. He had quarreled with two Archbishops of Canterbury, over the role of church courts; he had prevented other courts from hearing cases, by issuing prohibitions; he had told the King, once, when James talked about hearing cases himself, that His Majesty had great gifts but lacked the professional training necessary to decide questions concerning the common law. Coke was a loyal servant of the crown—and he

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[53] On other trials held at Winchester, see *Winchester Trials*, *supra* note 9, at 26, and Nicholls, *supra* note 8, at 821.

[54] *See* PAUL HYLAND, RALEGH'S LAST JOURNEY 189-96 (2004); 6 JAMES SPEDDING, THE LETTERS AND LIFE OF SIR FRANCIS BACON 361-62 (London, Longmans 1872).

was always willing to throw King James a financial favor, particularly if he could do it at the expense of the church, or the doctors who controlled medical practice in London—but he could never be relied on completely.

In 1615, Coke had even shown doubts about a treason prosecution. In 1615, in *Peacham's Case*, the English government brought treason charges against a Puritan preacher, far from London, out in the West Country. Reverend Peacham's offense was to have written a sermon—which was never preached; the King's men found the papers in his rectory—which was either an exegesis of the Old Testament or a heavy-handed political allegory. Reverend Peacham had written about divine judgments, emphasizing how God had visited punishment on the wicked. He had even suggested that that "[o]n a sudden . . . the King might be stricken with death, *perhaps within eight days, as with Ananias or Nahal.*" For such conjectures, Peacham was was arraigned for high treason, for compassing the death of the King.[55]

Whatever Coke had been willing to urge against men who plotted the death of the monarch, he had always observed at least one implicit limit on the scope of compassing or imagining. Coke, and Fyneux before him, had thought in fairly literal terms. They thought of actual plans to kill a specific king. They had not actually extended it to cover the more metaphysical, or metaphorical, dimensions of treason. Coke had also been troubled by the government's way of pursuing the case. While Peacham was being held, the Attorney-General, Sir Francis Bacon, had traveled widely, polling the individual judges, one by one, as to whether he individually believed that treason charges properly lay against Peacham. However, when Bacon came to Coke, the Lord Chief Justice rumbled like thunder that he did not like this "auricular taking of opinions," and hinted that he might well rule in Peacham's favor.[56]

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[55] CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 351 (1957).

[56] On *Peacham's Case*, *see* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), *sub* "Edmund Peacham;" BOWEN, *supra* note 55, at 351-55. Coke was will-

Observers began to note that Coke had changed. It would later be remarked: "It is a wonder . . . that Sir Edward Coke, lord chief justice, should differ from Mr. Attorney Cook [sic], for we know his thoughts in Sir Walter Ralegh's time[,] and his speeches in Charles I'[s] time; they are as different from each other as the times were . . . ."[57] So spoke Bartholomew Shower, recorder of London, in 1684. In the 1620's, as first among equals in the House of Commons, Coke would denounce treason and assert that there was no warrant for it to be used in England. He would claim that the King had no right to jail subjects without case shown. In 1628, in his last and greatest Parliamentary hurrah, he would author the Petition of Right, a confirmation of Magna Carta.[58]

After his parliamentary career was over, Coke turned to writing a summary of the law of England, his *Institutes of the Laws of England*.[59] Only one volume of these was published in his lifetime. However, after his death, in 1645, the *Third Institute*,[60] his commentary on English criminal law, was put in print. What Coke now reported as the law of treason fully justified Recorder Shower's musing about the difference between Coke as prosecutor and Coke as judge.[61] Coke reported, as good law, the decisions of the courts in the Oxfordshire rebellion case and in the case of Lord Cobham and the priests who

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ing, even at this late stage of his turbulent relationship with James, to grant the crown an advisory opinion, but he nonetheless was unwilling to see the judges individually questioned in a way which made it impossible for them to render a jointly-considered opinion. Coke may also have been influenced by the fact that Peacham's legal difficulties had begun with his friction with the bishop of Exeter. The investigation against Peacham had largely been conducted through the church courts. Coke (and Fyneux as well) also had a particular jealousy of judicial power and did not like to see church courts wielding it. *See also* Rex v. Owen, 1 Rolle Rep. 185 (1615); 5 SPEDDING, *supra* note 54, at 98-120.

[57] BOWEN, *supra* note 55, at 293.

[58] *See* STEPHEN O. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH,' 1621-1628 (1979) (discussing later parliamentary career of Sir Edward Coke).

[59] COKE, *supra* note 30.

[60] COKE, *supra* note 20.

[61] *See* Gerald Bodet, *Sir Edward Coke's* Third Institutes*: A Primer for Treason Defendants*, 20 U. TORONTO L.J. 469 (1970).

had organized the Bye Plot.[62] However, Coke now asserted, without qualification, that two witnesses were needed to prove treason.[63] When he discussed the treason statute of 1352, the text of which he personally had stretched so far, Coke wrote that the language of the law was meant to delineate and limit the meaning of treason ("And if that the construction by arguments . . . had been left to the judges, the mischief before this statute would have remained, viz. diversity of opinions, what ought to be judged treason, which this statute hat taken away by express words").[64] Coke announced that each treason charge had to be kept and considered separate and distinct and that no single action could be used to prove two different treasons.[65]

Moreover, a very different approach to analyzing guilt had quietly infiltrated the criminal law. In all the discussions of Ralegh's guilt, there is little discussion, if any, of what a modern-day lawyer would call *mens rea*. The lawyers discuss the nature of the crime and assert that Ralegh, a man of the sword, must be behind a plot which involves so much bloodshed. They look at the complexity or subtlety of the plot and argue that only a man as intelligent as Ralegh could have set it in motion. Nonetheless, they do *not* break out for separate consideration the question of whether Ralegh had an intent to commit conspiracy, treason and regicide. Rather, the issue is almost put this way: If a certain set of facts exist, then, without more, a conclusion follows. If one accepts that Ralegh committed certain acts, then it follows that Ralegh is a traitor.[66]

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[62] COKE, *supra* note 20, at 9, 11.

[63] *Id.* at 25-26.

[64] *Id.* at 1, 21.

[65] *Id.* at 13-14, 11.

[66] This perspective makes *Sir Walter Ralegh's Case* a cousin of *Slade's Case* (1602), 4 Co. Rep. 93b, which had been decided only a year before. Part of the holding in *Slade's Case* is the decision of the judges of England, sitting together in the Exchequer Chamber, that given that a party to a contract has promised to buy a hundred bushels of wheat, this of itself imports a promise to make payment for the wheat; the contract of itself generates an undertaking to perform the duties which the contract creates (thus satisfying traditional jurisdictional criteria for proceedings in *assumpsit*, which specified that that the buyer make an

The question may be principally semantic, but language is critical. It determines the premises here of analysis, and the premises lead to the conclusion.

Yet in the *Third Institute*, by contrast, the idea of *mens rea* had begun to take shape. Coke wrote:

> The ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treason; and so it appeareth by King Alfred's law before the Conquest, and in lib. 4 in Beverlie's Case. But now by this statute and by force of these words, *fait compasser ou imaginer la mort* [compass or imagine the death of the king], he that is *non compos mentis,* and totally deprived or all compassing, and imaginations, cannot commit High Treason by compassing or imagining the death of the king . . . .[67]

The idea of *mens rea* is present here—also the suggestion of change in the law. If a defendant accused of treason is insane, he cannot imagine the death of the King; he cannot form the intent. One can also see in this passage the start of the criminal law's attempt to figure out the puzzle of the insanity defense. Coke also wrote that the defendant had to demonstrate total incapacity: "[I]t must be an absolute madness, and a total deprivation of memory."[68]

Across the rest of the Seventeenth Century, Coke's *Institutes* became a Bible for those accused of treason. They provided a bulwark behind which political dissidents found all the shelter that they could: John Lilburne under the Commonwealth, Whig politicians and republican plotters during the reign of Charles II, and even Jesuits accused of Popish plots.

The *Third Institute* provided references which were not available at the start of the Seventeenth Century. Coke's writings gave a critical mass of precedents to the emerging field of constitutional law. During Ralegh's trial, both the government and the defendant had followed rhetorical forms. They had both

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independent post-contract promise to pay for the wheat).

[67] COKE, *supra* note 20, at 6.

[68] *Id.*

relied upon modes of argument – ways of assessing probabilities when the facts were murky. The *Institutes* provided an alternative to this. They allowed for citation and for arguments based on precedents. Rather than teaching lawyers to make arguments based upon logic, the *Institutes* offered a way to draw upon the bar's collective experience.

The facts behind the facts of Ralegh's prosecution mirror the uncertainties which were raised by the absurdities and double-talk of Ralegh's trial. The trial record leaves doubts about Ralegh's guilt; the historical record leaves doubts about his innocence.[69] The commissioners of the Winchester trials, if ever they questioned the work they had done, could recall that they had put down a dangerous set of conspirators and that they had resolved any doubts in favor of the safety of their monarch and their country. However, the lawyers and judges of the rising generation were less concerned with the machinations of Cobham and Ralegh (indeed, they had forgotten Cobham and believed Ralegh innocent) than with assuring that the problems of Ralegh's trial did not recur. The legacy of *Sir Walter Ralegh's Case* was not a satisfaction that rough justice had been done. It was a resolve to prevent abuse of the criminal process.

In the generation following Coke, Sir Matthew Hale, the next great judge in English history, would note that the adversary process "beats and bolts out the truth much better."[70] The lawyers in the Stuart House of Commons passed treason laws requiring the witnesses at an arraignment to confront the defendant face to face and that guilt be proven by two or more witnesses. In the Massachusetts Bay Colony, it would be argued that "interrogatories are unknown at common law, and

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[69] It may have been a failed free-lance case of attempted entrapment. John Aubrey reported a family tradition that Ralegh had intended to wait until Cobham had collected the vast sum of Spanish gold crowns and then seize his associate, buying King James' favor by presenting both the traitor and the gold. Ralegh himself wrote that he had been "[l]ost . . . for hearing a vain man." LETTERS OF SIR WALTER RALEGH, *supra* note 52, at 259.

[70] SIR MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713).

Englishmen and common lawyers have an aversion to them if not an abhorrence of them."[71] That was the generously outraged remark of John Adams, one of those lawyers whose concerns shaped the Sixth Amendment.

The law, Coke wrote, is the "artificial reason" of the judges, the professional consensus of those experienced in the law, "gotten by long study, observation, and experience."[72] The remark is one of those which Coke made from the perspective of the judge and it is an observation that has lasted. The law was suited to the people it governed, Coke continued, "because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men."[73] The strength of the Supreme Court's opinion in *Crawford v. Washington* is its consonance with the consensus that the common law so enduringly built.

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[71] *Crawford*, 124 S. Ct. at 1362 (quoting 2 LEGAL PAPERS OF JOHN ADAMS 194, 207 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)). Treason statutes required the open examination of witnesses. *E.g.*, SIR MATTHEW HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, J. Nutt 1713); 13 Car. 2, c. 1, § 5 (1661); *see also* Anne Rowley, *The Sixth Amendment Right of Defendants to Confront Adverse Witnesses*, 26 AM. CRIM. L. REV. 1547 (1989); Daniel Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337 (1991).

[72] COKE, *supra* note 30, at 62a.

[73] *Id.* at 97b.

# COMMENT

## LOSING THE BATTLE BUT WINNING THE WAR: THE FEDERAL GOVERNMENT'S ATTEMPTS TO REGULATE INTERNET GAMING THROUGH UTILIZATION OF THE WIRE ACT AND OTHER MEANS

### I. INTRODUCTION

The topic of Internet gaming[1] elicits varying responses. These responses are as numerous and diverse as the people utilizing the very thing at issue. There are cries to completely legalize it[2] and also attempts to update existing legislation, which the federal government uses to combat it.[3] Regardless of one's opinion on the subject, there is no denying that Internet gaming has enjoyed a surge in popularity over the

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[1] In the context of this paper, both "gaming" and "gambling," when used in relation to the Internet, should be regarded as interchangeable and both are to be interpreted to refer to any way in which the elements of consideration, chance, and prize are made available to a player by way of Internet usage.

[2] Tom W. Bell, Director of Telecommunications and Technology Studies at the Cato Institute, Testimony before the National Gambling Impact Study Commission (May 21, 1998), *at* http://www.cato.org/testimony/ct-tb052198.html (asserting that "[p]rohibiting Internet gambling will not make it inaccessible, whereas legalizing it will put the benefits of increased competition within the rule of law").

[3] *See* Benjamin Spillman, *Law Seeks to Outlaw Internet Gambling*, THE DESERT SUN, Oct. 9, 2000, *available at* LEXIS, News Library.

past decade. Internet gaming revenues have risen dramatically from $445 million in 1997[4] to more than $4 billion in 2003.[5] Americans account for the majority of this market,[6] despite the fact that the laws of each state currently prohibit any form of Internet gaming[7] and the federal government also takes the position that such activity is illegal.[8]

Because of the massive increase in Internet gaming, it is no surprise that the federal government has stepped in and tried to gain control of the situation. Historically in the United States, "whenever new communications arise, whether mail, radio, telephone, or a computer network, the federal government has perceived a threat of increased gambling and has passed or attempted to pass prohibiting legislation."[9] This is the case despite the fact that gambling regulation is an area that has traditionally been left to the discretion of the states.[10] The reason for the departure from the traditional method of state-based regulation when dealing with new communications mediums stems from the interstate nature of

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[4] Tony Batt, *Internet Gaming Back in Forefront*, LAS VEGAS REVIEW-JOURNAL, Apr. 2, 2004, *available at* http://www.reviewjournal.com/lvrj_home/2004/Apr-02-Fri-2004/business/23573242.html.

[5] Gregory Manter, *The Pending Determination of the Legality of Internet Gambling in the United States*, 2003 DUKE L. & TECH. REV. 16, ¶ 1 (2003), *at* www.law.duke.edu/journals/dltr/articles/2003dltr0016.html.

[6] Batt, *supra* note 4.

[7] Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J.L. & TECH. 26 (2004), *at* http://law.richmond.edu/jolt/vloi3/article26.pdf. The author notes that the Nevada legislature has passed a bill which would allow the Nevada Gaming Commission to permit Internet gambling if such gambling could be made to conform with federal law. *Id.* at n.7. This is of no consequence at present because it is the federal government's position that federal law prohibits all gambling over the Internet. Thus, it would be impossible for Nevada to create a conforming system. *See* Antonia Z. Cowan, *The Global Gambling Village: Interstate and Transnational Gambling*, 7 GAMING L. REV. 251, 269-270 app. B (2003) (citing letter from Michael Chertoff, Assistant Attorney General, to Peter Bernhard, Chairman, Nevada Gaming Commission (Aug. 23, 2002)).

[8] *See* Cowan, *supra* note 7, at 270 app. B.

[9] *Id.* at 256.

[10] *See* Gottfried, *supra* note 7, ¶ 2. Although the federal efforts represent an intrusion into an area of regulation typically left to the states, it is doubtful that the states have any complaints regarding such efforts, since they requested them. *See infra* note 12 and accompanying text.

such media.[11] The states have realized that they are unable to deal with the situation, and consequently have requested that the federal government get involved.[12]

Despite the aforementioned wishes of the states, federal legislation aimed at combating Internet gambling has failed to gain passage by Congress,[13] and therefore the present situation is "a stunning example of technology outpacing the law."[14] The only way that the federal government has been able to attempt prosecution of Internet gambling operations is through application of decades old statutes,[15] specifically the

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[11] *See, e.g., Internet Gambling: Hearing Before the Subcommittee on Technology, Terrorism, and Government Information of the Comm. on the Judiciary*, 106th Cong. (1999) (statement of Senator Jon Kyl), *available at* http://www.techlawjournal. com/cong106/gambling/19990323kyl.htm.

> Not every problem that is national is also necessarily federal. Internet gambling is a national problem AND a federal problem. The Internet is, of course, interstate in nature. States cannot protect their citizens from Internet gambling if anyone can transmit it into their states.

*Id.* (emphasis in original).

[12] *Id.*

> [T]he State Attorneys General *asked* for federal legislation to prohibit Internet gambling. In a letter to the Judiciary Committee members, the Chairs of the Association's Internet Working Group stressed the need for federal involvement: "[M]ore than any other area of the law, gambling has traditionally been regulated on a state-by-state basis, with little uniformity and minimal federal oversight. The availability of gambling on the Internet, however, threatens to disrupt each state's careful balancing of its own public welfare and fiscal concerns, by making gambling available across state and national boundaries, with little or no regulatory control."

*Id.* (emphasis added) (alteration in original).

[13] *See* Craig Lang, Notes & Comments, *Internet Gambling: Nevada Logs In*, 22 LOY. L.A. ENT. L. REV. 525, 534-36 (2002) (listing multiple Congressional attempts to pass legislation aimed at combating Internet gambling and the failure of each), *available at* http://elr.lls.edu/issues/v22-issue2/lang.pdf.

[14] Lawrence G. Walters, *The Law of Online Gambling in the United States—A Safe Bet, or Risky Business?*, 7 GAMING L. REV. 445, 445 (2003).

[15] *See, e.g.,* United States v. Cohen, 260 F.3d 68 (2d Cir. 2001) (discussed further *infra*); *In re* Mastercard Int'l Inc., 132 F. Supp. 2d 468 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002) (discussed further *infra*); United States v. Kaczowski, 114 F. Supp. 2d 143 (W.D.N.Y. 2000); People *ex rel.* Vacco v. World Interactive Gaming Corp., 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).

Wire Act,[16] Travel Act,[17] Illegal Gambling Business Act[18] and the Wagering Paraphernalia Act.[19] These statutes, which were designed to help the government prosecute organized crime (which relied heavily on gambling), "were passed with a direct legislative intent that [they] be applied extraterritorially as demonstrated by the use of broad prohibiting words in each statute including 'interstate or foreign commerce.'"[20]

Any of these statutes could provide a feasible option for the prosecution of those involved in the business of Internet gambling. "The Travel Act prohibits interstate or foreign travel or use of an interstate facility in furtherance of an unlawful business enterprise."[21]

> A conviction under the Illegal Gambling Business Act requires a showing that there is a gambling operation which (1) is in violation of state or local law; (2) involves five or more persons that either conduct, finance, manage, supervise, direct or own all or part of the business; and (3) remains in substantially continuous operation for thirty days or has a gross revenue of $2,000 on any given day.[22]

The Wagering Paraphernalia Act "criminalizes the interstate transportation, except by common carrier, of any record, writing, paraphernalia or device used, adapted or devised for use in bookmaking, sports wagering pools, policy, bolita or similar games."[23] Despite the apparent feasibility of using the Travel, Illegal Gambling Business and Wagering Paraphernalia Acts to prosecute those involved in Internet gambling operations, the Wire Act has become the federal government's primary enforce-

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[16] 18 U.S.C. § 1084 (1961).
[17] 18 U.S.C. § 1952 (1961).
[18] 18 U.S.C. § 1955 (1970).
[19] 18 U.S.C. § 1953 (1961).
[20] Cowan, *supra* note 7, at 257.
[21] *Id.*
[22] Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, 6 GAMING L. REV. 393, 396 (2002).
[23] *Id.*

ment mechanism.[24]

## II. Overview of the Wire Act

The Wire Act was passed in 1961 in an attempt, as was mentioned earlier, to combat organized crime. It was aimed at the increasing use of telephones and other communications facilities by illegal sports-betting operations.[25] The act prohibits:

> [b]eing engaged in the business of betting or wagering [and] knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.[26]

For liability to arise under the Wire Act, one must be more than just a casual gambler ("engaged in the *business* of betting of wagering").[27] Satisfaction of the knowledge element ("knowingly") has been interpreted by the courts to require only that the accused was aware that the acts proscribed by the statute were being committed, and not that the person understood the statute or even knew of its existence.[28]

In the context of the statute, a "wire communication facility" is defined as:

> [A]ny and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin

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[24] Gottfried, *supra* note 7, ¶ 46.

[25] *Id.* ¶ 45.

[26] 18 U.S.C. § 1084 (1961). Upon conviction, one may be subject to a fine and/or imprisonment of up to two years. *Id.*

[27] *Id. See* Rodefer, *supra* note 22, at 398 ("[C]asual bettors . . . fall outside the prosecutorial reach of the statute.").

[28] United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).

and reception of such transmission.[29]

No liability exists under the Wire Act if the information being transmitted is for use in news reporting of sporting events or contests.[30] Additionally, there exists a "safe harbor" provision that is applicable to transmissions between locations in which such betting is legal and where the transmission is limited only to information that assists other in the placing of bets (the transmission may not include the bets themselves).[31]

## III. Important Judicial Decision Addressing the Wire Act's Applicability to Internet Gambling

The federal government's efforts at prosecuting Internet gambling under the Wire Act have been met with mixed results. Few court decisions have resulted in a situation where the government believes the applicable law to be one way, Internet gambling advocates believe it to be another, and lingering judicial ambiguities mean that no one knows for sure.

In *United States v. Cohen*, the defendant was charged with conspiracy and substantive offenses in violation of the Wire Act.[32] These allegations stemmed from Cohen's running of the World Sports Exchange (WSE), an offshore Internet sports book.[33] FBI agents in New York were able to contact the WSE by both telephone and the internet and were able to open accounts and place bets with WSE through these communications media.[34] The conspiracy count and five of the seven substan-

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[29] Rodefer, *supra* note 22, at 398 (quoting in part from 18 U.S.C. § 1081 (1961)) (alterations in original).

[30] 18 U.S.C. § 1084(b) (1961) ("Nothing in this section shall be construed to prevent the transmission in interstate of foreign commerce of information for use in news reporting of sporting events or contests . . . .").

[31] *Id.* ("Nothing in this section shall be construed to prevent the transmission ... of *information assisting in the placing of bets or wagers* on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.") (emphasis added); *see also* Cohen, 260 F.3d at 73.

[32] *Cohen*, 260 F.3d at 71.

[33] *Id.* at 70.

[34] *Id.* at 71.

tive counts, that Cohen faced alleged violation of all three prohibitive clauses of the Wire Act.[35] In the other two substantive counts, "he was charged only with transmitting 'information assisting in the placing of bets or wagers.'"[36] Cohen was convicted on all counts on February 28, 2000.[37]

As opposed to that in *Cohen*, the court in *In re Mastercard International* ("*Mastercard*") was dealing with alleged Wire Act liability based not on Internet sports gambling but on Internet casino type gaming.[38] The plaintiffs in this case consisted of several gamblers who were suing various credit card companies and the banks issuing the cards for interacting with Internet casinos in a way that allegedly violated state and federal law.[39] Additionally, the plaintiffs argued that the "defendants' actions constitute[d] a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organization Act" (RICO).[40] In granting the defendant's motion to dismiss, the District Court spoke at length about why the Wire Act failed to cover Internet gambling on anything other than sporting events. Initially, they noted that "a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest."[41] Further, they asserted that a

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[35] *Id.* The three prohibitive clauses are "(1) transmission in interstate of foreign commerce of bets or wagers, (2) transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, (3) information assisting in the placement of bets or wagers." *Id.*

[36] *Id.*

[37] *Id.*

[38] *In re* Mastercard Int'l, Inc., 132 F. Supp. 2d 468, 480 (2001).

[39] *Id.* at 473.

[40] *Id. See generally* 18 U.S.C. § 1961 (1968).

[41] *Mastercard*, 132 F. Supp. 2d at 480. The court went on to note that "[b]oth the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a 'sporting event or contest.'" *Id.* Although the Mastercard court was confident in its belief that the language of the Wire Act clearly limited its application to Internet gambling on sporting events, other have not been so certain. *See* Robin Gareiss & John Soat, *Sure, Gambling Seems Like a Perfect Business Model for the Web. But Is It Legal?*, INFORMATION WEEK, July 8, 2002, *available at* http://www.informationweek.com/story/IWK20020703S0019 (noting that "sporting" is considered by some to modify only "event and not "contest," which could effectively expand the Wire Act to apply to all Internet gambling); *see also* Rodefer, *supra* note 22, at 399 ("[D]iffering interpretations have

reading of the case law dealing with the Wire Act leads to the same conclusion.[42] Even though the court saw no reason to examine the legislative history of the statute due to their drawing of a clear conclusion based on its wording and case law history, they took a "summary glance" and reinforced their position with the findings. There had been recent attempts to amend the Wire Act to encompass "contest[s] of chance or a future contingent event not under the control or influence of [the bettor]."[43] Also, as to the legislative intent at the time of passage, the "House Judiciary Committed [sic] Chairman explained that 'this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events.'"[44]

About all that can be drawn from these cases for certain is that "the Wire Act clearly prohibits the use of the Internet for transmission of sports bets or wagers or information assisting in the placement of such bets or wagers, unless transmission falls within one of the two exceptions . . . ."[45] The *Cohen* court did not examine the issue of non-sports related Internet gambling and it is possible that they would have decided that the Wire Act applies to it, but such gambling is obviously not prohibited, at least by the Wire Act, in the Fifth Circuit under *Mastercard*.

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arisen over the construction of the phrase 'any sporting event or contest,' and over whether the 40 year old Wire Act prohibits Internet gambling.").

[42] *Mastercard*, 132 F. Supp 2d at 480.

[43] *Id.* (alterations in original). *See supra* note 13; *see also* Walters, *supra* note 14, at 449 ("The court relied upon the unsuccessful attempts to amend the Wire Act to encompass betting on games of chance as opposed to sporting events on the Internet.").

[44] *Id.* at 480-81.

[45] Rodefer, *supra* note 22, at 399 (footnote omitted). *But see* David B. McGinty, *The Near-Regulation of Online Sports Wagering by* United States v. Cohen, 7 GAMING L. REV. 205, 210 (2003) ("Although it seems that the *Cohen* court felt the [Wire Act] included Internet transactions, it failed to effectively express so in the case opinion.").

## IV. Enforcement Problems

As has already been stated, the Wire Act's applicability to a large percentage of Internet gambling (that which is non-sports related) is doubtful. Even if the Act was determined to apply to all Internet gambling, the federal government would still have multiple problems in confronting such gambling by using it.[46]

The first of these problems is due to the location of the Internet gambling operations that the government seeks to prosecute. There are an estimated 1,800 Internet gambling operations in existence, and virtually all are based outside of the United States.[47] Since the Wire Act is only applicable to those "engaged in the business of betting or wagering," the only people that can be prosecuted under the statute are located abroad. This could render the jurisdiction question tricky in some cases.

> In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* . . . the court adopted an approach [to Internet-based jurisdiction analysis] under which "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." . . . [J]urisdiction would depend on examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. . . . [A situation] involving the most uncertainty . . . as to personal jurisdiction would be [the] mere exchange of information by a user and a host.[48]

Transmission of information assisting in the placements of bets or wagers is enough for criminal liability under the Wire Act,

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[46] The problems discussed in this section, with the exception of the one relating to the Wire Act's definition of "wire communication," are also reasons why the use of the other statutes mentioned earlier (Travel Act, Illegal Gambling Business Act, Wagering Paraphernalia Act) would do little to aid the government in its fight against Internet gambling.

[47] Jonathan Fowler, *WTO Ban on Offshore Gaming*, Miami Herald, Nov. 11, 2004, *available at* 2004 WLNR 9708834.

[48] Cowan, *supra* note 7, at 266 (citation omitted).

and this is a level of interaction that would put the jurisdictional issue onto "uncertain" grounds under the ruling in *Zippo*. Additionally, a successful prosecution of any person located internationally would depend on the other country's cooperation in the proceeding. Many of the countries where Internet gambling operations are based have not criminalized the practice and some even rely on it as a major part of their economies.[49] For example, it is estimated that online casinos employ 3,000 of Antigua's 67,000 residents.[50] For obvious reasons, any help towards the prosecution of those involved in Internet gaming from a country such as this is unthinkable. The result is that operators of Internet gambling enterprises need only remain outside the territorial jurisdiction of the United States in order to avoid prosecution by the federal government.

Besides the problems associated with the locations of those able to be prosecuted under the Wire Act, additional difficulty comes from the fact that technology may soon outpace the Wire Act's relevancy altogether. "Integral to the Act's definition of 'wire communication' is a '"wire, cable, or [any] other like connection."'[51] Because of the advent of wireless Internet capabilities, the "wire communication" required for the Act to apply may soon be non-existent in Internet communications.[52]

A further blow to United States' attempts to prosecute Internet gaming operators came recently when the World Trade Organization (WTO) ruled that the United States' prohibitions on Americans placing bets in offshore Internet casino's

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[49] Fowler, *supra* note 47.

[50] *Id.*; *see also* Cowan, *supra* note 7, at 267. Sir Ronald Sanders, Chief Foreign Affairs Minister of Antigua and Barbuda has stated that some of the anti-Internet gambling legislation proposed in Congress (specifically, the Unlawful Internet Gambling Funding Prohibition Act) could result in 800 lost jobs and the elimination of $2.2 million dollars in annual internet casino licensing fees. Caroline Bissett, *All Bets Are Off(Line): Antigua's Trouble In Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 372-373 (2003).

[51] Gottfried, *supra* note 7, ¶ 47; *see also supra* note 26 and accompanying text.

[52] Gottfried, *supra* note 7, ¶ 47. "With the advent of wireless Internet communications, Internet gaming operators will be able to bypass 'wire communication' all together." *Id.*

were an unfair trade barrier and violated trade agreements that had been reached as part of the WTO agreement.[53] The ruling is seen by some in the Internet gaming industry as the last push needed for the federal government to change their tune and begin a plan of regulation and taxation rather than prosecution.[54] In truth, the ruling will likely not have such an immediate effect. The government has vowed to appeal, and even if that fails, the WTO does not have any real enforcement mechanism.[55] Even if the verdict does not have the influence that some in the Internet gaming industry hope that it will, it still serves as a reminder of how the United States' policy towards Internet gaming is diametrically opposed to that of many other counties.[56] Due to all of the problems associated with the Wire Act's use against Internet gambling operations, and also the inability of Congress to pass legislation that would clear up some of the statutory ambiguities within the act, it seems doubtful that the federal government will ever be able to effectively control Internet gambling through utilization of the Wire Act.

## V. If Not the Wire Act, Then What?

Considering the hardships associated with the federal government's use of the Wire Act to prosecute those engaged in the business of Internet gambling, it is easy to draw the conclusion that such gambling will continue unimpeded within the United States. In actuality, this is not the case. The federal government is using other methods besides prosecution under the Wire Act to bring the problem (as they see it) under control.

First, they are threatening aiding and abetting liability

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[53] Fowler, *supra* note 47.

[54] David Stratton, *Online Gamers Boosted by WTO Ruling, Off Shore Gaming Association*, *at* http://www.osga.com/artman/publish/article_1602.shtml (last visited May 19, 2004).

[55] *Id.*

[56] *See generally* Theo. C. Ling & Arlan Gates, *The Law of Online Gambling: Canada in the Global Context*, 7 CYBERSPACE LAW (2003) (discussing different ways in which countries have chosen to handle the Internet gambling issue).

against anyone who performs services for Internet gambling operations, such as banks or advertisers.[57] This has proven to be a very effective step.

> [I]t is obvious that, in order for an Internet or related telephonic gambling operation to be commercially viable, money must flow from bettors to the operator and presumably in the opposite direction as well. The mechanisms for these transfers are the financial service providers, *i.e.* credit card companies, banks, and other entities that provide the means for funds transfers. Control of such financial service providers can therefore constitute a very potent and effective means of enforcing—albeit indirectly—a prohibition against illegal gambling activity.[58]

Some of the largest banks are now refusing to let customers use their cards in connection with online gambling.[59] Further, even more daring financial institutions have begun to follow their larger, more conservative counterparts and are declining to process these transactions.[60] Since the banks and credit card companies were reaping large sums from the processing of such these transactions, why would they so quickly cease doing so? The main reason is that "[c]redit card executives have a real fear that what they are doing may be illegal," and that they may be subject to RICO liability if they continue.[61] It is

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[57] *See U.S. Govt. Puts the Squeeze on Online Gambling*, ONLINE CASINO NEWS, Mar. 15, 2004, *at* http://www.onlinecasinonews.com/ocnv2_1/article/Article.asp?id=5012. This is a method in which use of the Travel, Illegal Gambling Business, and Wagering Paraphernalia Acts could benefit the government. The government may be able to establish aiding and abetting liability against third parties where they otherwise would not be able to if the Internet gambling businesses which they are helping are violating one of these three statutes, but not the Wire Act.

[58] Thomas N. Auriemma & Gary A. Ehrlick, *Proactive State Enforcement of Internet Gambling Prohibitions: Worth the Effort or a Waste of Time*, 6 GAMING L. REV. 507, 513 (2002).

[59] I. Nelson Rose, *Why Visa Is Dropping Online Gambling*, 7 GAMING L. REV. 243, 243 (2003).

[60] *Id.*

[61] *Id.* For an example of credit card companies being sued for RICO liability in connection with processing credit card transactions connected with Internet gambling see *supra* notes 38-40 and accompanying text.

not worth it to them to take a large risk for a reward that represents a small fraction of the transactions that their companies do.[62] With regard to advertisers, in a move strikingly similar to what occurred with credit card companies, many have quickly dropped their advertisements for Internet gambling, likely in response to federal pressure.[63] The position of members of the Justice Department is that because Internet gambling is illegal throughout the United States, carrying advertisements relating to it is equivalent to carrying advertisements for illegal drugs of prostitution.[64]

## VI. The Future of Internet Gambling in the United States

It is unlikely that they federal government will change its position regarding Internet gaming in the near future. They maintain their belief that the Wire Act applies to all types of Internet gambling, despite the fact that the *Mastercard* interpretation is likely to be the one adopted in other circuits when they have the chance to consider the issue.[65] Additionally,

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[62] *See* Rose, *supra* note 59, at 244 (explaining that people do not go through all the steps it takes to obtain a high position in the financial world to risk it for a small payback).

[63] Matt Richtel, *Web Engines Plan to End Online Ads for Gambling*, N.Y. TIMES, Apr. 5, 2004, *availoable at* LEXIS, News Library, N.Y. Times File. Advertisers that have ceased carrying advertisements for Internet gambling include Yahoo!, Google, Clear Channel, Discovery Network, and Infinity Broadcasting. *Id.* It is also worth noting that pressure on advertisers has not come only from the federal level. *See* Kelly B. Kramer, *A New Front in the Battle Against Internet Gaming?*, 6 GAMING L. REV. 21, 21 (2002).

> New Jersey's Attorney General seems intent on depriving these offshore gaming sites of the services provided by domestic third parties, such as telephone companies, billboard operators, media outlets, Internet companies, and software providers.
>
> . . . [T]he billboard companies leasing space to Internet casinos were contacted first. . . . Although it is not clear what the[y] were told, the offending billboard advertisements were speedily removed.

*Id.*

[64] *See* Richtel, *supra* note 63.

[65] This is the case due to the wording of the Wire Act and the unambiguous language of the legislative history associate with its passage.

their resolve does not seem to have wavered subsequent to the WTO verdict. This is not surprising, as Internet gambling presents additional problems not associated with traditional casino gambling. It also lacks many of the benefits that contribute to the willingness of federal and state governments to tolerate it when it is in the form of brick and mortar casinos.

Internet gambling is far more accessible to minors than is the gaming that takes place in a traditional casino setting.[66] All that a minor has to do is gain access to a credit card number, and typically they can from that set up an account and begin gambling.[67] Second, the development of casinos is believed by many to create jobs and stimulate the economy in those cities where they are located.[68] Indeed, many of the poorest communities in America have received new economic hope in the form of local casino gambling.[69] Internet gambling, in contrast, does not create any jobs or stimulate economic activity in any city (at least within the United States). American citizens lose millions of dollars yearly to enterprises that create a return to them and their country of next to nothing. When these negatives associated with the availability of Internet gambling domestically are considered, it is easy to understand why the state and federal governments have taken such a strong stand against it.

It is the federal government's willingness to continue fight-

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[66] *Proposals to Regulate Illegal Internet Gambling: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 5 (2003) (statement of Senator Chris Dodd). Although it is common sense that a minor would have an easier time gambling on the Internet than he or she would gaining access to a casino, these remarks by Senator Dodd show that this reality is a primary reason for the government's position of increased legislation and prosecution towards Internet gambling.

[67] *Id.*

[68] Although this belief is generally true, not every casino development is a success and a city must proceed with some degree of caution. *See* THOMAS A. GARRETT, FEDERAL RESERVE BANK OF ST. LOUIS, CASINO GAMBLING IN AMERICA AND ITS ECONOMIC IMPACTS 25 (Aug. 2003) ("While the evidence here suggests that counties that adopt casino gambling as a major industry are likely to see large employment gains, this is not to suggest that every county can become like Tunica, Mississippi.").

[69] *See* Garrett, *supra* note 68, at 25.

ing Internet gaming, even after the short-comings of the Wire Act as a vehicle for doing so became evident, that will be the reason for its decline in the United States in the coming years. The difficulty in obtaining ways to conduct the transaction, as well as the declining availability of advertising for these enterprises, will hinder their ability to market towards or do business with the American public. The federal government is beginning to turn the tide in its war on Internet gambling, even if use of the Wire Act was not the method that enabled it to do so.

*C. Jeremy Pope*[*]

[*] Dedicated to my parents whose leadership is the reason for all of my successes and none of my failures.

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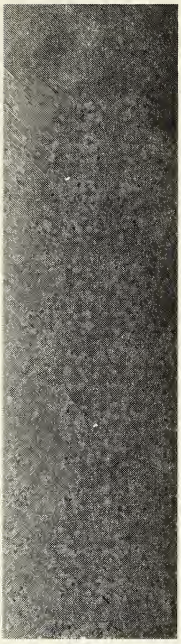

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